IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 79

ROBERT L. PIERSON, ET AL, *Petitioners,*

vs.

J. L. RAY, ET AL, *Respondents.*

No. 94

J. L. RAY, ET AL, *Petitioners,*

vs.

ROBERT L. PIERSON, ET AL, *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN CAUSE NO. 79 AND PETITIONERS IN CAUSE NO. 94

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INDEX

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Introductory Statement

This Court has granted certiorari in the case of Pierson, et al, v. Ray, et al, decided by the United States Court of Appeals for the Fifth Circuit and reported at 352 F 2d 213.

Certiorari was granted on petition of Robert L. Pierson, et al, jurisdiction resting under 28 U.S.C. 1254(1). Respondents, J. L. Ray, et al, filed an "Opposition" to the Petition for Writ of Certiorari. They then filed what under Mississippi practice would have been a cross-appeal, but which under the practice of this Court was called an "*Alternative*

Cross-Petition for Certiorari'' to review, if certiorari was granted on the Pierson petition, the holding of the Court of Appeals that Respondents who were police officers and were sued for damages under *42 U.S.C. 1983* could not defend on the ground of good faith in enforcing a state statute on probable cause. This Court granted both petitions, the one of Robert L. Pierson, et al, being No. 79 and the one of J. L. Ray, et al, being No. 94. This Court then consolidated the cases. To save confusion we will hereinafter at all times call Robert L. Pierson, et al, ''Petitioners'' and call J. L. Ray, et al, ''Respondents''.

The statutes involved are not only Section 1 of the Civil Rights Act, or *42 U.S.C. 1983,* but also Section 2087.5 of the *Mississippi 1942 Code, Recompiled.* A complete copy of said statute is attached hereto as Appendix A.

Questions Presented

Petitioners, three white and one Negro Episcopal clergymen, were part of a group of fifteen Episcopal clergymen who were arrested by Respondents Ray, Griffith and Nichols, policemen of the City of Jackson, Mississippi, and tried by Respondent Spencer, the municipal justice of said city. The four Petitioners here brought suit in the United States District Court for the Southern District of Mississippi, Jackson Division, against all four Respondents jointly for damages in the amount of $44,004.00.

The Complaint was in two counts, one for money damages under *42 U.S.C. 1983* and one for money damages for common law false arrest and imprisonment. Judgment on jury verdict in favor of Respondents was entered in the District Court.

Upon appeal the Fifth Circuit reversed the judgment and remanded the case. A full copy of the opinion of the Fifth Circuit is found R. 444.

Petitioners have, we submit, misunderstood and incorrectly stated the holding of the Court below. The Court first held that Judge Spencer was entitled to a directed verdict and that the court below should have dismissed as to him on his motion at the end of the testimony on the ground of judicial immunity. The Court then held that police officials are entitled to limited or partial immunity under the common law in an action for false imprisonment if under the facts there was probable cause for the arrest.[1] It did not hold, as stated by Petitioners, "... that the state law cause of action against the policemen should be dismissed", but merely held that Petitioners "were not entitled to a directed verdict of liability on the false-imprisonment claim" and reversed and remanded the case for a new trial in accordance with the opinion. The Court then held that Petitioners could not recover under *42 U.S.C. 1983* if a jury found that Petitioners went to Jackson not only contemplating the possibility of being jailed, but with a deliberate design and plan that they should be arrested, i.e., if they had such a design and plan, they were not entitled to recover money damages for having accomplished their objective.

Respondents agree with and seek the affirmance of each of the above holdings.

The Court then remanded the case because of errors in admission of evidence for another trial in accordance with the opinion.

By cross-petition Respondents point out that the Court below also held that the police officers had no immunity under *42 U.S.C. 1983*, i.e., not even limited or partial immunity even if the jury should find that they acted in good faith under a state statute valid on its face on probable cause, i.e., that the Civil Rights Act completely abrogated

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[1] As the jury had found.

even the common law limited or partial immunity or privilege of police officers. With this Respondents do not agree and submit that if the cause be reversed and remanded for a new trial that this defense is available to them and the case should be again tried on this issue also.

The questions therefore presented in Cause No. 79 are:

(1) There is no civil liability for money damages on police officers for common law false arrest where the officers acted in good faith on probable cause and no common law liability of a judge presiding over a court having jurisdiction.

(2) *42 U.S.C. 1983* does not abrogate or destroy judicial immunity.

(3) Police officers are not liable for damages under *42 U.S.C. 1983* if under the facts it is found that Petitioners were arrested because of a deliberate design and plan to be arrested, i.e., Petitioners cannot put into practice a program and conspiracy of planned arrest and confinement and then successfully rely upon such arrest and confinement as the basis for recovery in an action for money damages for false imprisonment. This would be equally applicable under common law false imprisonment.

In Cause No. 94 there is therefore presented the question:

(4) Are police officers automatically liable under *42 U.S.C. 1983* with no defense whatsoever, if the persons arrested are later acquitted, even though they acted in good faith under a state statute valid on its face on probable cause, i.e., does *42 U.S.C. 1983* completely abrogate all limited and partial common law immunity or privilege of police officers?

It must also be remembered:

1. This is not a cause involving an appeal from a criminal conviction. On the other hand, it is a suit for money damages for false imprisonment. Proof necessary to sustain a conviction is much greater than proof to sustain probable cause for an arrest, *Pritchard* v. *Downie*, 326 F.2d 323, *and different rules and principles of law apply.*

2. The arrests involved here occurred in September 1961 at a time when the civil rights uprising had just begun and when the law thereasto was not established. Also at that time the populace of the City of Jackson was very aroused and actual violence imminent. This would not be true in Jackson at this time although it is still true in other locations. The occurrence must be looked at from the viewpoint of that period. "Applicability of the Civil Rights Act to facts must be determined with reference to standards of constitutional protection current at the moment defendant acted." *Bowens* v. *Knazze*, D.C. Ill., 237 F. Supp. 826 (1965).

3. Respondents are not here arguing for any absolute immunity or absolute privilege of police officers, but only for a partial or qualified and limited privilege or immunity from damages when acting on probable cause and in good faith.

4. This case does not involve the jurisdiction of the court under the diversity statute and does not involve the jurisdiction of the court on any ground. Jurisdiction is admitted.

5. This cause does not merely involve the sufficiency of the Complaint. Most reported cases on the subject are only cases where the complaint has been dismissed without

a hearing. We are here discussing the issues presented after full trial on the merits on proper jury instructions and admissible evidence. Cases merely refusing to dismiss a complaint do not rule on or rule out or preclude defenses thereto such as good faith and probable cause.

6. The occurrences here involved were prior to the 1964 Civil Rights Act. Cf. *People* v. *Galamison,* 342 F.2d 255, cert. den. 14 L.ed.2d 272. The police officers here therefore did not violate any provision of that Act.

7. The Mississippi Breach of the Peace Statute, Section 2087.5, Appendix A, is not and has never been held unconstitutional on its face or per se, although unequestionably it can under some facts and circumstances be so enforced as to deprive parties of their civil rights. Section 2087.5 is not vague and indefinite. It does not make it a misdemeanor merely to refuse to obey the order of an officer. However, it does make it a misdemeanor if there is also (1) crowding or congregating with others, *and* (2) if the defendant is in a place of business engaged in selling or serving members of the public, etc., *and* (3) if there is an order to disperse or move on by a law enforcement officer, *and* (4) if the order is disobeyed, *and* (5) if there exists circumstances such that a breach of the peace may be occasioned [2] thereby or violence in others might be caused. If such conduct actually leads to a breach of the peace or incites a riot then the offense is made a felony. Nor can it be retroactively held that the enforcement thereof under the facts and circumstances here, valid at the time, deprived Petitioners of their civil rights. Because Petitioners in their brief repeatedly state, on all issues, that this statute is void on its face requiring a directed verdict against the police officers, our position is briefed as Appendix B hereto.

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[2] Unlike the Alabama statute involved in *Nesmith* v. *Alford,* C.A. 5, 318 F.2d 110, cert. den. 11 L.ed.2d 420.

We submit that this case must be reversed and remanded to the District Court for a new trial on all issues except the liability of Judge Spencer, and the finding of the Fifth Circuit on his immunity as a matter of law should be affirmed. However, if the Court below was in error in holding that introduction of certain evidence was reversible error, then this cause should be reversed and the judgment of the District Court reinstated in that there had been a jury verdict for Respondents.

Statement of Facts

On September 13, 1961, at about 11:20 a.m. fifteen Episcopal clergymen, twelve white and three Negro, all in full clerical garb, made a ceremonious entry as a group into the waiting room of the Continental Trailways Bus Station in Jackson, Mississippi. The fifteen clergymen proceeded across the waiting room toward the coffee shop in the bus station and as they were entering the coffee shop two police officers of the City of Jackson, Respondents Griffith and Nichols, told them to stop. The clergymen, including the four Petitioners here, obeyed the order and came back into the waiting room and congregated there standing in a group so as to block the stairs and congregating so as to be in full view of all of the occupants of the bus station waiting room.

Respondents Nichols and Griffith told the crowd several times to "Move along". None of the group obeyed the order. Instead the Lord's Prayer was said in unison. These Respondents then stated that the crowd was under arrest. The officers then called Respondent Chief Ray. When Ray arrived he again merely ordered the group of clergymen to move along, giving the order several times. No one obeyed the order. Chief Ray then again declared the group under arrest and himself led them through the waiting room to the paddy wagon and took them to the City

Jail in Jackson. The arrests were made under Section 2087.5 (See Appendix A). Respondents in so doing were admittedly at all times courteous and considerate.

There was a conflict of fact as to whether or not there was probable cause for the police officers to believe that the acts of the group of clergymen might cause violence on the part of the crowd in the waiting room. Petitioners' testimony was to the effect that although there were people watching them they were quiet and making no threatening gestures. The testimony of Respondents, on the other hand, was to the effect that the summer and fall of 1961 was a very abnormal time in Jackson immediately following the influx of the "Freedom Riders" in Alabama which had led to riots and bloodshed; that their later trip to Jackson had caused the City to be very tense. That all news medium had carried to the public the general information that Petitioners were coming and that there was much resentment thereof by the people of Jackson. Chief Ray testified:

> "A. I arrived at the Trailways bus terminal about 11:30 or 11:35. As I approached the terminal from the rear through the lot there, I was approached by a gentleman as I was entering there, and he told me that I had better hurry and get inside, and there was going to be some serious trouble. I immediately walked into the terminal, and it was an unusual amount of people in the terminal, and they were in a very dissatisfied and ugly mood, I would call it. And the focus point was near the entrance to the cafeteria, where a group of 15 ministers were standing. * * * The circumstances was there that was such that had I not removed the cause or the root of the trouble, there would have been violence and possibly bloodshed." (R. 395, 397)

He further stated:

> "A. 'As I have already described, they were an advertised group, and I have already told you that has been almost a month since the Freedom Riders were there and people were back kind of peaceful, kinda', and of course, when this advertised group came out in the paper and through the radio, there was a tense situation again, and they thought it was another movement of Freedom Riders. We had worked real hard to prevent any violence, and we didn't want to start again'." (R. 349)

Respondent Nichols confirmed this testimony and stated that some twenty-five to thirty people followed the group from the taxi into the station and that there were about that many more already in the station; that they were mumbling and in a very ugly mood, moving about and talking. (R. 406)

This testimony was further confirmed by Respondent Griffith who stated that he arrested them because they would not move on and if he had not "there would be violence and bloodshed. . . I felt we have a clean city here and I hope and pray that we can keep it this way and not have violence and bloodshed." (R. 416) That the crowd was in an ugly mood as reflected by the expressions on their faces and were making threatening gestures. He testified:

> "Answer: "The people of the City of Jackson was in a tense mood at that time, and they came in as a group as they did and the other people in the Trailways bus station was in an ugly mood. You could hear some mumbling in their voices and expressions on their

faces.' * * * Question: 'Did they have threatening gestures?' Answer: 'Yes.' " (R. 342)

There was no testimony whatsoever that the arrests were made merely because Petitioners were an integrated group, but that they were made because there was danger of actual violence in the crowd. There was no proof whatsoever that the City police were in the habit of arresting every integrated group, where there was no actual danger of violence, or that the Jackson police did on this occasion or ever use the statute as a sham justification for an arrest or that they did not enforce the statute without discrimination against any individual or group where violence was imminent.

There is very strong evidence that the fifteen Episcopal clergymen belonging to the group that were arrested by Respondents deliberately planned for and worked toward their being arrested by the police officers of the City of Jackson. There is, of course, a conflict of fact. Petitioners state that they were witnesses for integration and merely knew that there was danger of or a possibility of their being arrested. On the other hand, from their own written evidence there clearly appears that they had planned to and were on the trip for the purpose of becoming *"Witnesses for Incarceration"* and went into the terminal waiting room with deliberate intent to provoke an arrest, picking a time and place and manner of so entering as to best assure themselves that they would be arrested.

The group, including other clergymen beside the fifteen arrested, were members of the Episcopal Society for Cultural Racial Unity, an organization of Episcopal clergy but not connected with the church itself. The pilgrimage was organized by and under the direction and control of the Reverend John B. Morris, one of the Petitioners. He per-

sonally solicited the personnel of the group which was to take this pilgrimage beginning in New Orleans on to Jackson and then to Detroit where they were having a general meeting of ESCRU. The trip was made so that the pilgrims or members of the group, or at least some of them, could end up at the Detroit meeting and witness their efforts to promote the desegregation in the church and in society. (R. 134) However, beyond that they also planned and intended to get arrested so that they could go to the Detroit meeting and be "Witnesses for Incarceration."

Petitioner Morris obtained participants in the pilgrimage by letters addressed to Episcopal clergymen who were members of the ESCRU. Therein he stated frankly the purposes of the pilgrimage and the various plans for the pilgrimage and their arrest during it. He wrote frequent letters, after the group was organized, giving details as to their purposes and plans and issuing orders thereasto. These letters were in the nature of Directives from the Commander of the group to the members thereof.

One of the earlier Directives addressed "To Pilgrimage Applicants" was dated August 4, 1961. (R. 205) This letter contained the following language:

> "You are one of twenty-two priests accepted for the Prayer Pilgrimage tentatively. A list of these persons accompanies this letter. . . .
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> • • •
>
> "I may be in error, but I believe that 16 of the accepted applicants are white and 6 are Negro. I am sorry that we do not have more of the latter and, also, that thus far we do not have any of still other backgrounds. . . .
>
> • • •

"The Greyhound Company said yesterday that equipment might not be available. . . The fact that equipment may be unavailable for charter purposes, however, will not cause any significant change in our plans. We can take regularly scheduled runs. . . . An advantage to us would come in cost for presumably only a portion of the pilgrimage group will be able to complete the trip and it would be a rather expensive item to have a half-empty bus make the last part of the journey. . . .

• • •

"Depending on various things above we might change our starting point to Jackson, Mississippi. . . . We would only miss one school in New Orleans and could go over to Vicksburg to visit All Saints' College before any of the group kept an appointment with the Jackson jailer. . . .

• • •

". . . At the starting point, whether New Orleans or Jackson, the Rev. Wyatt T. Walker, Executive Director of the Southern Christian Leadership Conference, will direct our preparations connected with non-violent discipline. He will come to Detroit also in all likelihood to be on hand when those who have been in jail arrive probably just in time for the ESCRU dinner on September 20th.

". . . If there are 30 participants we should plan on between one-half and one-third completing the entire tour so that the concern might be carried to each place and, symbolically, the torch carried to Convention. This would mean that between fifteen and twenty would sojourn awhile in probably a Mississippi jail. A few might seek light refreshments the morning of the 12th

when we are in Vicksburg and they would then be held there by the Vicksburg jailer. The greater number intended by the witness of incarceration would probably choose to go to Jackson for this. Those who will bear the burden of watching colleagues taken off in the paddy wagon (as I did in Jackson two weeks ago) will continue the trip so that the message of concern may be carried to Detroit. Presumably the group will be able to determine who does what in a manner agreeable to all. I would hope that some would be left to go on through, and, indeed, the bail factor may require that we limit those to be jailed to around ten if there is to enough money to bail them out when decided.

". . . In nearly all other cases connected with Freedom Riders a certain length of time in the jail is sufficient to make the witness effective. I think that we should be very flexible in this matter: If someone has to hurry home because of an emergency or to be on hand for Sunday services it should be up to him when he is bailed out. There are preliminary hearings three times a week in Jackson so that the most you would have to stay in jail pending a hearing would be two days. Above that it is optional. . . .

". . . If some reason you would prefer to take care of your own bail please let me know and this will further strengthen our available resources for others. Should something develop in the next few weeks to indicate that a sufficient amount for bail for at least ten of our group is not available I will write you again. In the present context of things we will want to send at least ten of the pilgrimage participants to jail.

". . . it might be helpful for you to alert any press persons known to be sympathetic . . . they might want to do an advance story. Don't be reticent or self-

> conscious about the matter if your concern is to strengthen our witness through its advertisement in advance. . . ." (R. 205-211)

The details as to the plans for being assured that they would be arrested, how many would be arrested, etc. were repeated over and over again in the various later Directives. CORE had agreed to put up some of the money for bail. One letter stated:

> "The suggestion has been made that we hope that the entire group might visit the jail . . . but an alternative would be for a portion of the group to be bailed out forthwith and continue the trip. . ." (R. 224)

At another point he suggested that only ten might be able to go to jail.

Morris stated that he had already arranged for a lawyer to be furnished by CORE with whom he would go over the "legal points". (R. 226)

On August 19th he advised them:

> ". . . All in all, though, I think you can count on becoming *familiar* with the Jackson jail, or at least a goodly portion of our group can. Perhaps one of our number spoke for others when he said: 'About jail—Here am I, send me. I'm not brave, but I'm obedient.'
>
> "We *we* arrive in Jackson late Tuesday afternoon it will be time for supper and we can seek to have it then and there which will mean that the Jackson jailer would be our host for the evening. I am trying to determine whether we could stay at a college campus that night if it seemed advisable to await the next day for this appointment with destiny. I do not see any reason for not having our supper upon arrival, but I'll wait until my meeting Monday with CORE's lawyer to

see what procedure would be best. If we stayed overnight we would have to purchase individual tickets the next day and be headed for an intended trip. . ." (R. 226-7)

He carefully instructed the participants:

". . . For reading in the jail I suggest the P.B., your Bible, and other things you may want to meditate upon."

He again stated:

"I shall prepare a news release for September 3rd revealing final plans and giving the names of those to be involved. . . Don't be surprised if the arresting officers and others are quite civil and polite: It's a poor picture of the Northern image of the South when 'riders' tell the press how pleasantly surprised they were. . ." (R. 228-9)

In still another letter he stated:

"There are many possibilities, but at the present it looks like it may be the better part of valor to *consign* only a dozen men to jail. The picture could change. Some may want to stay in jail or await help from the Church back home. . . ." (R. 239)

See the series of Directives made exhibits to the testimony of the witness Morris (R. 176, 188, 193, 196, 205, 222, 238, 240, 244).

Thus, Petitioners well knew the danger of and were anticipating actual violence from others as a result of their appearance under the carefully planned circumstances. They knew that their trip had been higly publicized by all news medium and had planned for their appearance and

trip to be so publicized and instigating the publicizing thereof. They knew of the tension among the local people and knew that their acts would be very controversial. They had been carefully trained to expect violence from others and to submit thereto.

Petitioners thus definitely planned in advance and conspired that a certain number of their group would actually go to jail and be "witnesses for incarceration". There was no mention in the Directives of later collecting money damages from the arresting police officers. However, they immediately after their acquittal sought such money damages. They admittedly knew that the circumstances were such that a breach of the peace or violence of the crowd would probably occur and had congregated with the deliberate intent to provoke such a breach of the peace. The acts of the group constituted a conspiracy to cause a breach of the peace.

The planned procedure was followed out and the planned results accomplished and the fifteen clergymen were arrested and jailed. Petitioners admit that they were regular processed upon arrival at the jail and that a proper affidavit was filed by Chief Ray in the police court of the City of Jackson. No bail was requested at that time although it was obtainable. They were arrested at noon on the 13th. They were duly tried in the Police Court under Respondent Judge Spencer on September 15th. From then on, of course, the police officers had no further participation in what occurred. They were represented by counsel before Judge Spencer, including a local attorney and the chief legal adviser for CORE. No jury trial was requested by Petitioners although one could have been had by them if requested. None of the Petitioners testified in their own behalf although Judge Spencer would have heard the same and he did hear evidence from Respondents. Petitioners were on this evidence convicted and given four months in

jail and $200.00 fine. Release on bail was immediately available to them but only obtained later at various times at the convenience of Petitioners. The courtesy with which they were treated was freely admitted.

Judge Spencer under the evidence before him was of the opinion that the Petitioners were guilty of violation of the ordinance. (R. 369) The fact that he might have been in error on the question of law as to whether mere disobedience of the order of a police officer could be a misdemeanor is immaterial, the question being one which has caused differences of opinion among judges of superior courts. Nor is it material that in rendering his opinion he referred to provisions of the Episcopal Prayer Book, the reference not being his standpoint for judging the guilt or innocence of the Petitioners. (R. 369-70)

There was no proof whatsoever of any conspiracy entered into by Judge Spencer with reference to these cases. Each, and every one of the Respondents testified that Judge Spencer had nothing whatsoever to do with the arrest of Petitioners and the cases were never discussed with him and that he knew nothing of the cases until they came up for trial in his court and then were decided only on the evidence submitted.

The case was tried de novo on appeal to the County Court of Hinds County, Mississippi. Petitioner Jones was tried before a jury and a directed verdict for said Petitioner was granted. Petitioners are in error in stating that it was granted because there was *no* evidence to support the same. The judgment of the Court was merely that it was granted. (R. 82) This decision could have been either on the ground that the evidence was *insufficient* in the judgment of Judge Moore to show a violation *or* that it was insufficient for a conviction in view of his interpretation of the statute. *Or*, as suggested by Respondents themselves, it could have been

purely on the basis of respect for the Episcopal Church and a dislike to allow a conviction of clergymen. (R. 148-9) In the other cases judgments of nolle prosequi were entered.

The judgments in the County Court were entered in the late Spring of 1962. By September 10, 1962, this action was brought by these Petitioners for damages against all Respondents as joint tort-feasors in the amount of $11,-101.00 for each of the four Petitioners.

At the trial of this case before a jury there was ample evidence to support the finding of the jury that Respondent officers in making the arrests were motivated solely by proper concern for the preservation of order and the protection of the general welfare and that they acted in good faith and that the police officers were justified in taking action to prevent what in their opinion, based on reasonable grounds, would provoke a breach of the peace in the form of violence, i.e., that was probable cause for the arrest.

If Judge Spencer is not entitled to absolute immunity, there was ample evidence to show that in making his decision he was motivated by his concept or understanding of the law and the facts. Two years later the Supreme Court of Mississippi came to the same legal conclusion on similar facts. *Thomas* v. *State,* 160 So.2d 657.

If there were no reversible errors in the admission of evidence then this jury verdict would be controlling. Otherwise, Petitioners are merely entitled to a new trial on these issues.

POINT I

The Court Below Correctly Held That There Was No Liability for Damages of the Police Officers Under Petitioners' Common Law Count Which Was a Tort Claim for False Imprisonment if the Officers Acted in Good Faith and Had Reasonable and Probable Cause to Believe That the Statute Was Being Violated.

The Court below in its opinion on this point stated:

> "The doctrine of immunity which has long prevailed with respect to judicial officers, has been extended to other officers of government whose duties are related to the judicial process. Bar v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1434, Norton v. McShane, 5th Cir. 1964, 332 F.2d 855, cert. den. 380 U.S. 981, — S. Ct. —, 14 L. Ed. 274; Gregoire v. Biddle, 2nd Cir. 1949, 177 F.2d 579, cert. den. 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1363. In this cause, as in Norton v. McShane, supra, *the doctrine of official immunity protects the police officers from common-law false-imprisonment liability....*" (R. 448-9) (Emphasis added.)

The Court below then held that Mississippi law controlled and that under Mississippi law probable cause was a defense for common-law false arrest and that therefore the trial court's instruction on probable cause was not error. In so doing, the Court below stated:

> "The appellants complain of the trial court's instruction on probable cause, and an objection to it was made and preserved. If the trial court had been correct in its assumption that Section 2087.5 was a valid statute defining a misdemeanor, then the instruction would have been proper. A police officer is permitted to arrest, without a warrant, for misdemeanors committed in his

> presence. . . . The rule followed in Mississippi, which may be the minority rule but which is controlling here, is that a public officer is not charged with the duty of determining at his peril whether a statute is valid when he is acting under it. Golden v. Thompson, 194 Miss. 241, 11 So. 2d 206. Thus the challenged instruction was not improper when given . . . the *conduct of the appellees* would be tested by the situation existing at the time of their action."[3] (R. 452)

The Fifth Circuit Court of Appeals was correct in the above holding that probable cause could be a defense of the police officers when acting under *Section 2087.5*.

There was no question but that Petitioners were congregating in a public place. There was no dispute but that they failed to move on on order of the officers. There was sufficient evidence to support a jury finding that there was reasonable ground for the officers to believe that such a congregation of the fifteen Episcopal preachers was with intent to provoke a breach of the peace and was also under such circumstances that actual violence might be occasioned thereby. There was no question but that the offense was committed in the presence of the arresting officers. The arrests under such circumstances brought them within the terms of *Section 2087.5*.

True, the arrests were made without a warrant. However, Section 2467 of the *Mississippi Code* provides that an

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[3] The Court therefore did not hold that there was no liability on the part of the officers for common-law false arrest as a matter of law or direct a verdict for the policemen on these grounds. This issue would be still before the jury if the case is remanded for a new trial. Nor did the Court, as evidently believed by Petitioners, dismiss the complaint as to this count on the ground of lack of jurisdiction. We therefore do not know why Petitioners argue that the Court had jurisdiction under diversity if for no other reason. (The Petitioners' Point IV in their brief, page 33) This is admitted.

arrest for any crime or offense may be made by a policeman of any city. Section 2469 provides that "arrests for criminal offenses, and to prevent a breach of the peace, or the commission of a crime, may be made at any time or place." Section 2470 of the *Code* provides: "An officer or private person may arrest any person without warrant for an indictable offense committed, or a breach of the peace threatened or attempted in his presence."

Sction 2474 of the *Mississippi Code* provides: "Officers and others who make arrests as authorized, or required by law, shall not be liable on account thereof, civilly or criminally, notwithstanding it may appear that the party arrested was innocent of any offense."

However, we do not place the non-liability of the officers here for false imprisonment solely upon this statute. Probable cause is a common law defense to false imprisonment ***both in Mississippi and generally.***

In *Forsythe* v. *Ivey*, Miss., 139 So. 615, plaintiff was arrested for drunkenness in a public place without a warrant. It later developed that he was not drunk but was suffering from some mental and physical temporary disorder. An action for false imprisonment was brought and resulted in a jury verdict for the plaintiff. The Supreme Court reversed the judgment and entered a judgment there for the officers. The officers had requested and been refused an instruction to the effect that if the jury believed that the plaintiff "in the presence of the arresting defendant officers was walking like he was drunk, talked like he was drunk . . . and conducted himself as to lead a reasonable and prudent person to believe that he was drunk, and that. . . (the officers) acting in a reasonable and prudent manner, did believe the plaintiff was drunk, or was about to commit some breach of the peace. . . then they had a right to arrest the plaintiff and put him in jail, and it will be your duty to

render a verdict for the defendants, even though the jury may further believe that after the arrest of the plaintiff it developed . . . that the plaintiff was at the time suffering from some mental and physical temporary disorder, or ailment, which caused him to . . . conduct himself as to indicate to and lead a reasonable and prudent person to believe that he was drunk, or that some breach of the peace was threatened or attempted." The Supreme Court held the refusal of this instruction error and in reversing the case used the following language:

> "Under the law, policemen are required to arrest persons without warrants for misdemeanors committed in their presence. Drunkenness in a public place is a misdemeanor . . . in the case of drunkenness, *policemen must act upon appearances, and the evidence in this case clearly presents a case where the policemen were warranted in believing that the plaintiff was drunk at the time of the arrest.*
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> • • •
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> ". . . We think the defendants were entitled to the instruction first hereinabove set out. . . ." (Emphasis added.)

Two companion cases involving a misdemeanor, i.e., having intoxicating liquor in the possession of the person arrested, are *Baldwin* v. *State,* 167 So. 61, and *Copeland* v. *State,* 30 So.2d 509. In both instances the arrest was made by an officer without warrant on the ground of a misdemeanor committed in his presence although the officer did not know, but could merely infer, that the crime was being committed. The Court in each instance held that if what he saw was sufficient to constitute reasonable grounds to

believe that the crime was being committed, that the arrest was legal. In the *Baldwin* v. *State Case,* the Court held:

> "An officer has the right to arrest without a warrant for the commission of a misdemeanor in his presence. Section 1227, Code of 1930. A misdemeanor is being committed in the presence of an officer when he then and there acquires knowledge thereof through one of his senses . . . *'or inferences properly to be drawn from the testimony of the senses.' . . . These facts . . . justified the officer in drawing the inference, from what he had observed, that the bottle in the paper sack contained whisky."* (Emphasis added.)

In the *Copeland* v. *State Case,* the Court stated:

> ". . . the testimony of the sheriff discloses much more than a mere suspicion on his part that a misdemeanor was being committed in his presence and was competent; and that what he saw and observed was sufficient to entitle him to make the arrest. . . ."

Cases holding that probable cause is also a defense to an action for malicious prosecution include: *King* v. *Weaver Pants Corp.,* Miss., 127 So. 718; *Powell* v. *Weiner,* 176 So. 731; *Lenaz* v. *Conway,* 105 So.2d 762.

As stated, this is not a local rule or an isolated holding of the Mississippi court or peculiar to Mississippi. It is the general rule.

This was the rule in this Court prior to *Erie. Seaboard Oil Co.* v. *Cunningham,* 51 F.2d 321, cert. den. 76 L.ed. 557. In *Director General* v. *Kastenbaum,* 68 L.ed. 146, 263 U.S. 25, the Court in discussing an action for false imprisonment stated:

> "The gist of it is an unlawful detention and, that being shown, the burden is on the defendant to establish

> *probable cause for the arrest* . . . Probable cause is a mixed question of law and fact. The Court submits the evidence of it to the jury, with instructions as to what facts will amount to probable cause if proved."

The above case was cited with approval in *Carr* v. *National Discount*, C.A. 6, 176 F.2d 899, and the Court in applying Michigan law stated:

> "One may not be held liable for such arrest unless it was brought about without probable cause . . . The essence of a claim for false imprisonment is that the imprisonment must be false,—that is, without probable cause."

The Illinois law with reference to liability for false imprisonment is stated in *Bucher* v. *Krause*, C.A. 7, 200 F.2d 576, cert. den. 97 L.ed. 1404. The Court stated:

> "Whether the officers were acting *reasonably* when they attempted to place plaintiff under arrest is, under Illinois decisions, one of fact . . . If evidence supporting such a conclusion is present but is controverted or if it will support a contrary inference, then the question must be submitted to the jury."

In Mueller v. *Powell*, C.A. 8, 203 F.2d 797, the Court in discussing the Missouri rule with reference to probable cause justifying an arrest without a warrant stated:

> "What would constitute such a reasonable and probable ground of suspicion is incapable of exact definition, beyond saying that the officer must not act arbitrarily, but must exercise his *discretion* in a legal manner, using all reasonable means to prevent mistakes . . . Appellant's guilt or innocence of the crime for which he was arrested and about which he was questioned was and

> is not the issue in this case . . . The issue was whether there was factual justification or 'probable cause' for the appellees to suspect that appellant had committed the crime. The trial court found there was."

In *Henry* v. *United States*, 4 L.ed.2d 134, 361 U.S. 98, this Court, in discussing an arrest without a warrant, stated:

> "Evidence required to establish guilt is not necessary . . . Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. . . . If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent."

This would be particularly true where the crime itself was such that the officer could not determine with precision the commission thereof. This would be true in the case of drunkenness. See *Goins* v. *Hudson*, 55 S.W.2d 388. This would certainly be true with reference to a crime the commission of which involves the probability of the occasioning of a later breach of the peace. The question of whether or not a breach of the peace might be occasioned thereby could only be determined by good faith discretion of the trial officer.

In the case of *Wells* v. *Gaspard*, La., 129 So.2d 245, a misdemeanor for which the arrest was made without a warrant was an ordinance prohibiting persons under 18 years from loitering on streets or in public places. Whether or not the crime was actually being committed could not be determined with exactness by the officers. It later developed that the boy arrested was over 18 and was a boy of good reputation with respectable parents. The Court, in affirming a finding of the fact of the trial court that the police officers had reasonable grounds for believing that the boy

was committing a misdemeanor in their presence and denying right to damages for false imprisonment, stated:

> "... A police officer cannot be held for damages, even though subsequently the person arrested be found innocent, if the arrest for a misdemeanor be made when the public officer in good faith has probable cause to believe it is being committed in his presence."

Although Petitioners do not contest this holding of the Court with any force we have included it in this brief at some length because of the statement of Petitioners in their brief that the Mississippi rule is "contrary to most jurisdictions." That, as we have pointed out above, is not correct. This is important not only on this question, but is of great importance on the issue of liability under *42 U.S.C. 1983* which we submit must follow the common law tort liability rule.

POINT II

The Court Below Properly Held That 42 U.S.C. 1983 Does Not Abrogate or Destroy the Common Law Doctrine of Judicial Immunity.

The Fifth Circuit in its opinion in discussing this issue held that Judge Spencer should have been granted a directed verdict at the conclusion of the trial.

At common law a judge has absolute judicial immunity against suits for damages when presiding over a court having jurisdiction. The Court below was correct in holding that *42 U.S.C. 1983* did not destroy the judicial immunity of Respondent Spencer.

No question has been raised as to the general jurisdiction of the court presided over by Respondent Spencer. Petitioners had been arrested for a misdemeanor pursuant to *Section 2087.5, Mississippi 1942 Code*, a full copy of which

is made Appendix A hereto, and thereunder could have been punished by limited fine and imprisonment in the county jail.

Judge Spencer was the Police Justice and ex officio Justice of the Peace under *Section 3374-103, Mississippi 1942 Code,*[4] by which the City Police Justice is given full power of a justice of the peace in any case arising within the city limits. By Section 1831 a justice of the peace is given general jurisdiction of any crime committed in his district "... whereof the punishment prescribed does not extend beyond a fine and imprisonment in the county jail..." Affidavits were immediately filed by the arresting officers with Police Justice Spencer. (For typical affidavit see R. 74).[5]

Bond was available immediately either from the Justice of the Peace (Section 2492) or even before the hearing from the arresting officers (Section 1834). No such bail was requested.

At the trial before Judge Spencer Petitioners were represented by two eminently qualified and capable attorneys. A jury was available and within the rights of Appellee but no jury was requested. (Code Section 1836 and 1839.) Oral evidence was introduced by the prosecution but none of the Appellants testified in their own behalf. The resulting conviction was not only anticipated and anticipatable but patently desired by Petitioners.

The common law immunity of Judge Spencer to civil damages is beyond question. The leading case is *Bradley* v. *Fisher,* 80 U.S. 335, 20 L.ed. 646, where this Court in 1871,

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[4] Full copies of this and the following sections of the Code are not attached in that Appellants do not raise this issue.

[5] Even if the affidavits had been ineffective, which they were not, jurisdiction of the court would not have been destroyed, but the same were amendable even in the circuit court on appeal. *Henry* v. *State,* Miss., 154 So. 2d 289, cert. den. 11 L. ed. 2d 604.

speaking through Mr. Justice Field, used the following language:

"... The plea, as will be seen from our statement of it, not only sets up that the order of which the plaintiff complains was an order of the Criminal Court, but that it was made by the defendant in the lawful exercise and performance of his authority and duty as its presiding justice. . . . If such were the character of the Act, and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, *however erroneous the Act may have been, and however injurious in its consequences it may have proved to the plaintiff*. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. . . .

• • •

"Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. . . .

"... If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. . . .

"If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

* * *

". . . A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. . . . But, if on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him. . . ." (pp. 649, 650, 651)

The convictions in this case in 1861 by Police Justice Spencer can hardly be criticized when in 1964 the Supreme Court of Mississippi affirmed convictions under very similar circumstances and under the same statute. Cf. *Thomas* v. *State*, 160 So.2d 657.

The Court of Appeals of the Fifth Circuit correctly held that Appellee Spencer should have been granted a directed verdict when the evidence was in. On this issue the opinion of the Court below contains the following language: (R. 447-8)

> "The appellee Spencer filed a motion to dismiss the complaint as to him on the ground that his actions were [fol. 659] judicial and he was immune from any civil liability. The motion was deferred for decision until the trial of the case on the merits. No ruling on the motion was made. The judgment for the appellants made the question unimportant, but we think it is appropriate to say that the motion should have been granted. By the leading case of Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646, the immunity was established of judges of courts of superior or general jurisdiction from liability for damages growing out of the performance of their judicial duties. The doctrine has been extended to the judges of all courts. Barr v. Matteo, 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed 2d 1434; Yaselli v. Goff, 2nd Cir. 1926, 12 F.2d 396, aff. 275 U.S. 503, 48 S. Ct. 155, L. Ed. 395. The rule applies to city magistrates and municipal judges. Cuiksa v. City of Mansfield, 6th Cir. 1957, 250 F.2d 700, cert. den. 356 U.S. 937, 78 S. Ct. 779, 2 L. Ed. 2d 813; Reilly v. United States Fidelity & Guaranty Co., 9th Cir. 1926, 15 F. 2d 314; 35 C.J.S. 707, False Imprisonment § 44. Such is the law in Mississippi. Bell v. McKinney, 63 Miss. 187. The judicial immunity applies in civil rights actions as

well as at common law. Norton v. McShane, 5th Cir. 1964, 332 F. 2d 855, cert. den. 380 U.S. 981, — S. Ct. —, 14 L. Ed 24 274. If a judicial officer acts in the clear absence of all jurisdiction and authority he incurs liability for a false imprisonment caused by him. 35 C.J.S. 707, False Imprisonment § 44. *The Mississippi statute, Sec. 2087.5, on its face, was sufficient to justify the action taken by Judge Spencer.* The statute had not then been held invalid.[6] It was subsequently upheld by the Supreme Court of Mississippi in Thomas v. State, 160 So. 2d 657, Farmer v. State, 161 So. 2d 159, and Knight v. State, 161 So. 2d [fol. 660] 521. We think it cannot be said that there was a clear absence of jurisdiction in the appellee Spencer at the time action was taken by him although, since this cause was argued before us, the statute was held *invalid*[6] *as applied to circumstances such as those in this case.* Thomas v. Mississippi, 380 U.S. 524, 85 Ct. 1327, 14 L. Ed. 24 265. See Boynton v. Virginia, 364 U.S. 454, 81 S. Ct. 182, 5 L. Ed. 24 206. A judge should not be put to a correct determination of the validity of a criminal statute at the hazard of being cast in damages for the making of a wrong guess. We think it was proper to defer a ruling on the motion of the appellant Spencer but it should have been granted when the evidence was in."[7] (Emphasis added.)

It is now thoroughly established that judicial immunity applies in civil rights actions as well as at common law and

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[6] The statute has never been held invalid on its face. See Appendix B and briefing of this point. Whether it was erroneously and thus unconstitutionally enforced under the circumstances here does not destroy judicial immunity.

[7] Followed by the Fifth Circuit in *Carmack* v. *Gibson,* 363 F. 2d 862 (Adv. Sheets).

that *42 U.S.C. 1983* does not abrogate this common law immunity.

The leading case, although actually dealing with legislative immunity, by virtue of its excellent discussion of the history, purpose and intent of *42 U.S.C. 1983* is *Tenney* v. *Brandhove*, 95 L.ed. 1019, 341 U.S. 367. This Court there stated:

> "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an even rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of §§ 1 and 2 of the 1871 statute—now §§ 43 and 47 (3) of Title 8—were not spelled out in debate. We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."[8] (p. 1026-27)
>
> "The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well ordered system of jurisprudence. It

[8] The immunity of the judiciary is equally well founded in the common law. *Bradley* v. *Fisher*, supra.

has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country."

This case was followed and applied to judicial immunity in *Francis* v. *Crafts*, C.A. 1, 203 F.2d 809, certiorari denied 98 L.ed. 357. The complaint was filed under Section 1983 against a judge who had allegedly, without notice or hearing, ordered a 17 year old person committed as a defective delinquent. The court in affirming a dismissal of the complaint pointed out that any interpretation of 1983 abrogating judicial immunity even though the defendant acted in good faith in compliance with what he believed to be his official duty and even though the action was not tortious at common law would be "... an awesome and unqualified interpretation". In relying on *Tenney* v. *Brandhove*, supra, the Court said:

"It is clear that the immunity of judges from civil liability for acts done in the course of their official functions is no less firmly and deeply rooted in the traditions of Anglo-American law, reaching back to ancient times. See the learned opinion by Chief Justice Kent in Yates v. Lansing, 1810, 5 Johns., N.Y., 282, tracing the origins of this doctrine of judicial immunity back to the days of Edward III.... Referring to the doctrine of judicial immunity from civil suit, Chief Justice Kent observed, 5 Johns. at page 291: 'It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts, amidst every change of policy, and through every revolution of their government. A short view of the cases will teach us to admire the wisdom of our forefathers, and to revere a principle on which rests the independence of the administration of justice.' Further he said, 5 Johns. at page 296: 'Ought

such a sacred principle of the common law, as the one we have been considering, to be subverted, without an express declaration to that effect?' . . . ." (p. 811)

The last expression on this subject of a Court of Appeals is *Bauers* v. *Heisel*, C.A. 3, 361 F.2d 581 (1966) (Adv. sheets). There a county prosecuting attorney in New Jersey had procured the indictment of the plaintiff although he was a minor and although the New Jersey statute excised from the prosecutor's responsibility the prosecution of minors. The Court, in affirming that the complaint for damages under the Civil Rights Act should be dismissed, used the following language:

"Rather than rely on the plethora of cases which have held judicial officers to be immune from suit under the Civil Rights Act,[9] we believe that two maxims, one of statutory construction and the other of judicial restraint, when applied and coupled with Tenney, clearly indicate that judicial immunity was not abrogated by the Act.

"First, *it is well settled that a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment.* Mobile Gas Service Corp. v. FPC, 215 F.2d 883 (C.A. 3, 1954), aff'd, United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956); American District Telegraph Co. v. Kittleson, 179 F.2d 946 (C.A.8, 1950); Scharfeld v. Richardson, 76 U.S. App. D.C. 378, 133 F.2d 340, 145 A.L.R. 980 (1942). There can be little doubt that the concept of judicial immunity is deeply rooted in Anglo-American law. . . .

[9] To this statement the Court cites some 40 to 50 cases upholding the immunity of judicial officers under Section 1983.

> "The statute before us also has no express declaration to that effect; nor does the legislative history adequately support the conclusion that Congress intended to dissolve judicial immunity. . . ." (pp. 586-7)

In the *Bauers* v. *Heisel* Case, supra, the Third Circuit specifically and emphatically overruled its prior decision, before *Tenney*, of *Picking* v. *Pennsylvania R. R.*, 151 F.2d 240,[10] where it had held that the judicial immunity would not be afforded to a justice of the peace. In so doing, the Court stated:

> "We are not alone in our belief that the construction given R.S. § 1979 in Tenney sheds new light on the situation which confronted us in Picking. Although Picking had been the cause of some immediate concern, see Note, 46 Colum.L. Rev. 614 (1946), it was not until after Tenney that its pronouncement on immunity became the object of *wholesale disavowal.* In fact, five circuits explicitly stated that Tenney had in effect overruled Picking. Stift v. Lynch, 267 F.2d 237 (C.A.7, 1959); Cuiksa v. City of Mansfield, 250 F.2d 700 (C.A.6, 1957), cert. denied, 356 U.S. 78 S. Ct. 779, 2 L.Ed. 2d 813 (1958); Kenney v. Fox, 232 F.2d 288 (C.A. 6), cert. denied sub nom. Kenney v. Killian, 352 U.S. 855, 77 S.Ct. 84, 1 L.Ed. 66 (1956); Tate v. Arnold, 223 F.2d 782 (C.A. 8, 1955); Morgan v. Sylvester, 125 F.Supp. 380 (S.D. N.Y., 1954), aff'd, 220 F.2d 758 (C.A. 2), cert. denied, 350 U.S. 867, 76 S.Ct. 112, 100 L.Ed. 768 (1955); Francis v. Crafts, 203 F.2d 809 (C.A. 1), cert. denied, 346 U.S. 835, 74 S.Ct. 43, 98 L.Ed. 357 (1953). . . ." (p. 585)

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[10] And yet here Petitioners rely almost entirely on this *Picking* v. *Pennsylvania R. R.* See Petitioners' brief page 24-25. The other cases cited are all before *Tenney* and also deal with the sufficiency of complaints charging the Judge with acting corruptly, viciously and willfully.

An interesting case upholding the immunity of judges and predicting that the Third Circuit would overrule *Picking* is a case from the Sixth Circuit, *Kenney* v. *Fox*, 232 F.2d 288, certiorari denied 1 L.ed.2d 66, wherein the Court collects a large number of authorities. This same circuit in the later case of *Puett* v. *City of Detroit, Department of Police*, 323 F.2d 591 (1963), applied the immunity rule to a city judge.

Between *Tenney, supra, and Bauers*, supra, the following cases from practically every circuit have affirmed the judicial immunity under Section 1983: *Byrne* v. *Kysar*, C.A. 7, 347 F.2d 734; *Morgan* v. *Sylvester*, 125 F.Supp. 380, affirmed C.A. 2, 220 F.2d 758, cert. den. 100 L.ed. 768; *Rhodes* v. *Houston*, 202 F. Supp. 624, affirmed C.A. 8, 309 F.2d 959, cert. den. 9 L.ed.2d 719; *Puett* v. *City of Detroit, Department of Police*, C.A. 6, 323 F.2d 591; *Sarelas* v. *Sheehan*, C.A. 7, 326 F.2d 490; *Rhodes* v. *Meyer*, C.A. 8, 334 F.2d 709, cert. den. 13 L.ed.2d 186; *Schoen* v. *Mountain Producers Corporation*, C.A. 3, 170, F.2d 707, cert. den. 93 L.ed. 1095; *Kenney* v. *Fox*, C.A. 6, 232 F.2d 288, cert. den. 1 L.ed.2d 66; *Spires* v. *Bottorff*, 223 F.Supp. 441, cert. den. 13 L.ed.2d 349; *Gabbard* v. *Rose*, C.A. 6, 359 F.2d 182; *Smith* v. *Dougherty*, C. A. 7, 286 F.2d 777, cert. den. 7 L.ed.2d 97. This list is far from exhaustive.

Petitioners in their brief on this issue (pages 19-26) do little more than attempt to make their own analysis of the legislative history on the lines of *Picking* v. *Pa. R. Co.*, C.A. 3, 151 F.2d 240, which, as we have pointed out, has been overruled by that circuit and which cases from all the other circuits refuse to follow since Tenney, which discussed at great length the legislative history. Also there was no reason why Congress could not have expressly overruled the common law on judicial immunity if that had been the decision of the Congress. Certainly it is well settled that a

statute would not be construed as being in derogation of the common law unless it expressly so states.

What Petitioners seem to be objecting to primarily is the absolute immunity of judicial officers even though they corruptly or viciously or wilfully violated constitutional rights. This absolute immunity does not have to be relied on by Respondent Spencer here. There is no evidence that even indicates that he did not act in good faith and that at the most made an error of law. Petitioners can point to no statement of any witness in this case which would indicate that the acts of Judge Spencer in reaching his decision was corrupt or vicious or fraudulent or wilful or as a result of conspiracy. Petitioners are in grave error in stating that he "convicted the ministers of a crime for which there was no evidence". As we have heretofore pointed out, police officers testified to facts which justified the conviction under 2087.5; none of the Petitioners testified in their own behalf; and the case was tried on an affidavit of the Chief of Police.

A judge cannot be held liable for civil damages for an error of law or an error of fact. If Judge Spencer could be held liable for an error in interpreting the statute or in applying the statute to the acts of Petitioners here, then every justice on the Supreme Court of the State of Mississippi could be held liable to all of the appellants in the three cases where it made a similar error and the justices of this Court and of any court could be held liable to litigants in prior cases if and when they later overruled a prior decision.

POINT III

The Court Below Properly Held That There Was No Liability of the Police Officers for Money Damages Under 42 U.S.C. 1983 if the Petitioners Deliberately Planned and Provoked the Arrests for Which the Damages Are Sought.

Petitioners take the position that they only recognized that they might be arrested. There was, however, strong evidence that they deliberately planned and conspired to provoke the arrests and to be arrested so that they could publicize themselves as *"witnesses of incarceration"*.

Even under Petitioners' theory, that they merely acted in such a way that arrests were a possibility, there would be no liability for money damages if the officers acted in good faith with probable and reasonable cause to believe that the acts of Petitioners would actually cause a breach of the peace. Petitioners' position seems to be two-fold: (1) That they have an absolute constitutional right to demonstrate under the First Amendment regardless that thereby law and order could not be maintained and (2) that it therefore followed that they had an absolute right to collect money damages from the arresting officers even if their acts deliberately threatened law and order.

Considering their first position: Petitioners rely on *Cooper* v. *Aaron*, 358 U.S. 1, 3 L.ed.2d 5, to the effect that a state statute could not require segregation in the schools on the ground that thereby law and order could be maintained. The case does not hold that the right to demonstrate under the First Amendment is limitless and absolute regardless of the breakdown of law and order.[11]

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[11] Nor is it in point that a state statute absolutely preventing the alienation of property by the owner thereof was held not justifiable for the purpose of preserving peace under the police power, cf. the other case relied on of *Buchanan* v. *Warley*, 245 U.S. 60, 62 L. ed. 149. It did not hold that the right to demonstrate is limitless and absolute regardless of the breakdown of law and order.

The position of Petitioners is upon an assumption which runs exactly counter to the holdings of this Court. The rule still recognized by this Court was stated in *Breard* v. *Alexandria*, 341 U.S. 622, 95 L.ed. 1233, as follows:

> "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life."

The non-absolute character of First Amendment rights was recognized in *Roth* v. *United States*, 354 U.S. 476, 1 L.ed.2d 1498, and in *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 6 L.ed.2d 105.

This Court, speaking through Mr. Justice Douglas, has in *Terminiello* v. *Chicago*, 1949, 337 U.S. 1, 4, 69 S.Ct. 894, 895-896, 93 L.Ed. 1131, while extolling freedom of speech as a vital freedom, stated: "That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire (315 U.S. 568), supra, pp. 571-572 (62 S.Ct. 766, 86 L.Ed. 1031), is nevertheless protected against censorship or punishment, *unless shown likely to produce a clear and present danger* * * *."

Other cases from this Court holding that the right to demonstrate and rights of freedom of speech, etc. are subservient to the rights of the state to maintain peace and order include: *Cantwell* v. *Connecticut*, 310 U.S. 296, 84 L.ed. 1213; *Cox* v. *New Hampshire*, 312 U.S. 569, 85 L.ed. 1049; *Feiner* v. *New York*, 340 U.S. 315, 95 L.ed. 295; *Poulos* v. *New Hampshire*, 97 L.ed. 1105, 345 U.S. 395; *Hughes* v. *Superior Court*, 339 U.S. 460, 94 L.ed. 985. See also a collection of cases in *Niemotko* v. *Maryland*, 340 U.S. 268, 95 L.ed. 267.

Therefore, it cannot be said that Petitioners had an absolute right to march as a group into the station even though they thereby caused law and order to be destroyed or broken down. It therefore cannot follow that they have an absolute right for damages under *42 U.S.C.* 1983 for such acts. This statute grants no new constitutional rights.

We can assume that Petitioners had a right to perform any legal act, but it is not a legal act to provoke violence. The performance of a legal act would not destroy the rights of police officers acting under the police power of the state to make an arrest if they, in their honest opinion based on probable cause, believed violence was actually threatened.

However, here the Court below and Respondents here are talking about more than mere acts of the ministers deliberately done in spite of their realization that the police might arrest them. We are talking about an actual plan and conspiracy to provoke a threatened breach of the peace and thereby provoke an arrest—a question of fact for the jury in this case.

The court below in its opinion on this point (R. 452-3, 545-5) used the following language:

> "The appellant Morris was the executive director of the society which organized and supervised the prayer pilgrimage. The court admitted in evidence, over timely objections, his letters and memoranda used in organizing and planning the pilgrimage. From these exhibits and from the testimony of the appellant Morris it could have been inferred that one of the purposes, perhaps the prime purpose of the pilgrimage was to have at least ten of the group jailed in Jackson. The length of time for remaining in jail was discussed. Arrangements in advance for bail bond and for counsel had been made, or so it could have been found. In one of the communications it was said:

'All in all, I think you can count on becoming familiar with the Jackson jail, or at least a goodly portion of our group can.

Perhaps one of our number spoke for us when he said, "About jail—Here I am, send me. I'm not brave but I'm obedient.' "

The evidence would have permitted a finding, not only that being jailed in Jackson was a possibility, but that the participants would go to Jackson for the purpose of procuring their jailing and would so conduct themselves as to assure the achievement of that result. We do not say that this evidence required such a finding; we say that it permitted it. If the appellants' claims can be defeated by a showing of a plan and purpose of being arrested and jailed, then the evidence was properly admitted. We think that such a showing would preclude recovery . . .

• • •

"The question is not whether the appellants could lawfully dramatize their protests against racial inequality by attempting to eat in a wrongfully segregated lunch room in a bus terminal of an interstate passenger carrier. It goes without saying that they might do so. Rather the question is whether, in so doing, can they include in their program a planned arrest and confinement and then successfully rely upon such confinement as the basis *for recovery in an action for damages for false imprisonment.* Throughout the common law of torts the maxim, volenti non fit injuria, is applicable. It is applicable to false imprisonment.

35 C.J.S. 712, False Imprisonment § 46 c. one who has invited or consented to arrest and imprisonment should be denied recovery. Hulberstadt v. Nelson, 34 Misc.2d.

472, 226 N.Y.S.2d 100; Greene v. Fankhauser, 137 App. Div. 124, 121 N.Y.S. 1004; Stork v. Evert, 47 Ohio App. 256, 191 N.E. 794. The principles set forth in the recent case of State v. Moore, ——Miss.——, 174 So.2d 352, show a recognition of the rule as applicable in Mississippi, although under a factual situation different from the case before us. An earlier decision, and one more nearly in point on its facts, is Williamson v. Wilcox, 63 Miss. 335, where it was said, 'For a purely private injury one cannot maintain a suit when he has consented to the act which produced the injury.'... Since, as is said in Monroe v. Pape, supra, 'Section 1979 [42 U.S.C.A. § 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' We think the tort principle of volenti non fit injuria applies to the claim asserted for a civil rights violation under 42 U.S.C.A. § 1983 as well as to the common-law cause of action. . . . It therefore follows that there should be a new trial of the civil rights claim against the appellee police officers so that there may be a determination of the fact issue as to whether the appellants invited or consented to the arrest and imprisonment." (Emphasis added.)

Petitioners in response thereto would have us assume that this rule is limited to the doctrine of assumption of risk in negligence cases and that there is no such thing as assumption of risk where the person is performing a constitutional act. This of course is not correct. The doctrine of assumption of risk applies when a man is performing the perfectly constitutional act of doing his work, while walking down a city street, etc. *However, the principle relied on here is much stronger than the doctrine of assumption of risk. It is what is called an "inherent defense" to the tort here sued on.*

This is an action for a tort, i.e., false arrest. *Certain torts*, including false imprisonment, *exist only where no consent was given*. In other words, consent is not merely a defense, but the absence of consent is an inherent and integral part of the tort to be proved by plaintiff before commission of the tort can be proved.

See the statement of the rule in *Prosser on Torts*, 2d Ed., Chapter 4, Section 18, p. 82-3, as follows:

> "The consent of the person damaged will ordinarily avoid liability for intentional interference with person or property. *It is not, strictly speaking, a privilege, or even a defense, but goes to negative the existence of any tort in the first instance.* It is a fundamental principle of the common law that volenti non fit injuria—to one who consents no wrong is done. . . . As to intentional invasions of the plaintiff's interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. 'The absence of lawful consent,' said Mr. Justice Holmes, 'is part of the definition of an assault.' The same is true of false imprisonment, conversion, and trespass."

For instance, in the law of assault: "The absence of lawful consent," said Judge Holmes, "is a part of the definition of assault." *Ford* v. *Ford*, Mass., 10 N.E. 474. It is also a part of the definition of trespass. It is also part of the definition of rape. Above all, it is part of the definition of false imprisonment.

The rule is announced in *35 C.J.S.*, False Imprisonment, p. 712, as follows:

> "Where a person is instrumental in causing or provoking his own arrest or detention, no liability attaches, as where a warrant, alleged to be illegal, was placed in the hands of an officer at the request of the person against whom it was issued. So one cannot

maintain an action for false imprisonment who by his own conduct or statements induces his arrest under a process not naming him correctly or which is not intended to describe him."

In *Hulberstadt* v. *Nelson*, 226 N.Y.S.2d 100, the Court held:

". . . Plaintiff invited the arrest, and he should be denied recovery on that ground alone", citing *Prosser on Torts*, supra.

Petitioners were clearly acting under the doctrine of "civil disobedience." This doctrine was expounded by Thoreau and of course by Gandhi. Laws which a man considers unjust or laws which violate a man's conscience may have the force of the state behind them but under the doctrine of "civil disobedience" a man is called upon to break them. This is the doctrine espoused by Rev. Martin Luther King. However, Petitioners have overlooked part of this doctrine of civil disobedience. If a man in his own conscience feels that he is called upon to break laws, there goes with this theory the fact that he must "submit gladly to the consequences of breaking them."

There is no question but that Petitioners could, to paraphrase the court below, dramatize their protest against racial inequality by going in an integrated group into a bus terminal so long as they did not cause violence, i.e., they could become "witnesses" against racial inequality so long as they did not cause a breakdown of law and order. However, a different proposition arises where they thereby deliberately seek to become "witnesses of incarceration". Perhaps they have a right to do so if they accept the consequences. *A different question is presented when they seek to profit financially therefrom and recover money damages for so doing.*

POINT IV

42 U.S.C. 1983 Does Not Abrogate and Completely Destroy the Limited Immunity or Privilege of Police Officers Acting in Good Faith on Probable Cause. Therefore the Court Below Erred in Holding That There Was Not a Jury Issue as to Whether or Not the Police Officers Acted on Probable Cause in Making the Arrests so as to Absolve Them From Liability for Money Damages Under 42 U.S.C. 1983.

Since Tenney all Circuit Courts of Appeal, except the Fifth Circuit in this case, have held that *42 U.S.C. 1983* does not abrogate the common law limited or partial immunity or privilege of police officers. Most of these decisions are since Monroe v. Pape, ante.

These various Courts of Appeal base their decision upon one of three different reasons or occasionally commingle the reasons. The holdings can be and are justified upon the basis of either of the following grounds:

(a) *The reasoning back of the rule that 42 U.S.C. 1983 does not abrogate the absolute immunity of judges applies with equal force to the common law partial or limited immunity or privilege of police officers.*

The limited or partial immunity or privilege of a police officer is equally as well established as a common law[12] rule as the total or absolute immunity of a judge. See Point I, supra. Particularly see *Barr* v. *Matteo,* 360 U.S. 564, 3 L.Ed. 2d 1434, ante. Tenney construed the 1871 statute as not obliterating the common-law privilege or immunity of legislators. The other cases heretofore cited, Point II, have held it did not destroy the common-law rule

[12] It is not "a local rule of immunity unassociated with a generally recognized common-law immunity" which the Court said in *Cohen* v. *Norris,* 300 F.2d 24, could not stand as a defense in a Civil Rights Act case.

of immunity of judicial officers. There is no reason why it should be interpreted any differently as to police officers, i.e., it should not be construed as totally destroying the common-law partial or limited immunity of police officers.

(b) *Relief under 42 U.S.C. 1983 is limited to a denial by police officers of due process of law or equal protection of the law.*

Some authorities hold that *42 U.S.C. 1983* only applies where the officers have deprived plaintiff of due process. *Bottone* v. *Lindsley*, C.A. 10, 170 F.2d 705, cert. den. 93 L.ed. 1101. Other cases hold the deprivation by the officers of either due process or equal protection of the laws are within the act. *Moss* v. *Hornig*, C.A. 2, 314 F.2d 89, and cases cited. However, all cases agree that acts of the officers are not within the statute unless there has been either a denial of due process or such discrimination as would deny equal protection of the laws under the Fourteenth Amendment, i.e., the statute does not permit recovery to protect other constitutional rights such as rights under the First Amendment.

There is not involved here any denial by the police officers of either due process or equal protection of the law. An arrest without a warrant *and* without probable cause is a denial of due process, but an arrest without a warrant with probable cause for a misdemeanor is not a denial of due process. Nor is there any suggestion here of any denial by these police officers of Petitioners of the equal protection of the law, i.e., there is no proof that Section 2087.5 of the Code was discriminatorily enforced by the City police. The type of proof necessary to establish such denial of equal protection of the law by police officers is well known. See *Snowden* v. *Hughes*, 88 L.ed. 497, 321 U.S. 1; *Moss* v. *Hornig*,

214 F.Supp. 324; *Wright* v. *Rockefeller*, 376 U.S. 52, 11 L.ed. 2d 512. Cf. *Oyler* v. *Boles*, 368 U.S. 448, 7 L.ed. 2d 446.

This limitation of the applicability of 1983 arises from the language thereof requiring that the plaintiff be subjected to a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws[13] * * *" For the historical background of the holding that rights, privileges and immunities of the Constitution only refer to the due process and equal protection provisions of the Fourteenth and Fifteenth Amendments, see the *Slaughter House Cases*, 16 Wall. 36, 21 L.ed. 394; *Brawner* v. *Irvin*, 169 F. 964; *Wadlergh* v. *New Hall*, 136 F. 941.

(c) *Probable defense and good faith being a common-law defense for police officers, 42 U.S.C. 1983 will not be construed as abrogating the common-law rule.*

Not only is this rule applied in interpreting *42 U.S.C. 1983*, but it is a general rule of construction that no statute will be construed as altering the common-law further than its words import or as making any innovation upon the common-law which it does not clearly and fairly express. *Heard & Company* v. *Krawill Machinery*, 3 L.ed.2d 820, 359, U.S. 297, citing *Shaw* v. *Railroad*, 101 U.S. 557, 25 L.ed. 892, and *Texas, etc. Co.* v. *Abilene Cotton Oil*, 204 U.S. 426, 51 L.ed. 1075 Cf. *Pae* v. *Stevens*, C.A. 9,256 F.2d 208; *Globe* v. *Rutgers Fire Ins. Co.* v. *Draper*, C.A. 9, 66 F.2d 985; *Brotherhood of R. and S. Cl., etc.* v. *Norfolk So. Ry. Co.*, C.A. 4, 143 F.2d 1015.

Prior to a discussion of actual cases holding that *42 U.S.C. 1983* does not totally abrogate the common-law partial immunity of police officers, we call the attention of the Court to a case which discusses the common law immunity of

[13] There is no question here of any deprivation of Petitioners of any rights under any Federal law in force at that time.

lesser public officials and the public policy which justifies such immunity:

The reason requiring such a qualified privilege or immunity is ably stated by this Court in *Barr* v. *Matteo*, 360 U.S. 564, 3 L.ed. 2d 1434. That case involved an action for libel and slander against a director of the Office of Rent Stabilizaiton.[14] The Court quoted with approval the language of Judge Hand in *Gregoire* v. *Biddle*, C.A. 2, 177 F.2d 579, involving an action for common-law false arrest against arresting officers. The Court in the opinion, speaking through Mr. Justice Harlan, used the following language:

> "The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties —suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand:
>
> "' . . . it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again

[14] Although the case involved a suit of defamation, the opinion clearly points out that the rules of law expressed therein apply to civil tort suits generally. The opinion has been so construed in subsequent cases. See *Bershad* v. *Wood*, C.A. 9, 290 F.2d 714; *Norton* v. *McShane*, C.A. 5, 332 F.2d 855 at 858, n. 3.

> the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative * * * ."

Also before calling the attention of the Court to cases specifically dealing with the partial immunity of police officers, we call the attention of the Court to the inapplicability of *Monroe* v. *Pape*, 5 L.ed.2d 492, 365 U.S. 167, which the Fifth Circuit completely misunderstood. That was a case where the police officers without any statutory authority made an unlawful search and seizure without a warrant, not accompanied by an arrest. We have no fault to find therewith. Acting in direct conflict with state statutes the policemen there invaded the home of the plaintiffs and made a search and seizure without a warrant and they then merely later arrested and detained the plaintiff without a warrant. Under the allegations of the complaint[15] there was no possible justification for or defense for the acts of the police. There was alleged, as the Court pointed out, a clear "misuse" of the power of the officer.

Moreover, Monroe v. Pape makes it clear that the liability under the statute would follow the common-law rule of liability of officers. The Monroe v. Pape opinion on this point concludes with the language: "Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his action."

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[15] The complaint had been discussed without trial by the Court of Appeals. 272 F.2d 365.

That is all we are asking here, i.e., that the liability be read only against the background of common-law tort liability of a police officer for false arrest.

The Court below correctly held that immunity was not discussed in the Monroe v. Pape Case. However, it overlooked that it was not involved in that case whatsoever. That was a search and seizure case.

Probable cause is not a ground for immunity for police officers for illegal search and seizure. This lack of probable cause as a partial immunity for an illegal search and seizure is discussed in *Cohen* v. *Norris*, C.A. 9, 300 F.2d 24, where the Court stated:

> "Since it is alleged, with respect to this first overt act, that appellees did not have a search warrant, it follows that the search was unreasonable unless it was made incident to a valid arrest, or was made under exceptional circumstances which dispense with the need of a search warrant * * *"

In a note to the above decision in Cohen v. Norris, supra, there appears the following language:

> " . . . a search not incident to a lawful arrest must rest on a search warrant, probable cause to obtain such a warrant being insufficient. Chapman v. United States, 355 U.S. 610, 615, 81 S.Ct. 776, 5 L.ed.2d 828; Johnson v. United States, 333 U.S. 10, 13-15, 68 S.Ct. 367, 92 L.ed. 436."

As stated, Monroe v. Pape was on appeal from a dismissal of the complaint without trial. Upon reversal the case was remanded and tried resulting in a jury verdict for the plaintiff against the police officers. On motion of the police officers for judgment notwithstanding the verdict the court held that it could not be granted and pointed out the difference between the defense of probable cause and an arrest

on probable cause in a case involving searches and seizures. The court in so holding stated:

> " 'The law relating to search and seizure is more restricted than the law relating to arrest. This is because the Constitution of the United States and the Constitution of the State of Illinois expressly provide limitations upon invasions of the privacy of the individual and his home and personal effects.
>
> * * *
>
> " 'Although there may be an arrest without a warrant, upon probable cause, under the laws of Illinois, though the law may be different in other states, there may not be a search of a home without a warrant. * * *' " (221 F.Supp. at 647)

Cf. *McMahan* v. *Draffen*, Ky., 47 S.W.2d 716.

See also *Chapman* v. *United States*, 5 L.ed.2d 828, 365 U.S. 610, and *Johnson* v. *United States*, 333 U.S. 10, 92 L.ed. 436, holding that, except for a search made at the time of and after, a lawful arrest must rest on a search warrant, probable cause to obtain such a warrant being insufficient.

Therefore, in Monroe v. Pape there was not involved the issue here of partial immunity for an arrest if good faith and probable cause is shown.

Nor did the officers here, if the jury find on competent evidence that the officers acted in good faith on probable cause, "misuse" their power. They were not under such circumstances wrongdoers in any normal sense of the word.

Turning now to the various holdings of various circuits in actions under *42 U.S.C. 1983* that are directly in point:

From the *First Circuit* Court of Appeals we call the attention of the Court to:

In *Cobb* v. *City of Malden*, 202 F.2d 701, the Court held that the statute did not destroy a qualified privilege of mem-

bers of the City Council and other public officers for acts done by them *"in good faith in performance of their official duty as they understood it"*. The Court in so holding used the following language:

> "This is not the first time that a court has been perplexed by the apparently sweeping and unqualified language of the old Civil Rights Act. 8 U.S.C.A. §43 seems to say that every person in official position, whether executive, legislative, or judicial, who under color of state law subjects or causes to be subjected any person to the deprivation of any rights secured by the Constitution of the United States, shall be liable in damages to the person injured. The enactment in terms contains no recognition of possible defenses, by way of privilege, even where the defendants may have acted in good faith, in compliance with what they believed to be their official duty. Reading the language of the Act in its broadest sweep, it would seem to make no difference that the conduct of the defendants might not have been tortius at common law; for the Act, if read literally, creates a new federal tort, where all that has to be proved is that the defendants as a result of their conduct under color of state law have in fact caused harm to the plaintiff by depriving him of rights, etc., secured by the Constitution of the United States.
>
> "Fortunately, Tenney v. Brandhove, 1951, 341 U.S. 367, 71 S.Ct. 783, 95 L.ed. 1019, has relieved us of the necessity of giving the Civil Rights Act *such an awesome and unqualified interpretation.* • • •
>
> "So far as concerns federal tort liability for acts done under color of state law, I think the Supreme Court in effect has held, in Tenney v. Brandhove, that the Act merely expresses a prima facie liability, leaving to the courts to work out, from case to case, the

defenses by way of official privilege which might be appropriate to the particular case.

"' . . . *Hence I take it as roughly accurate generalization that members of a city council, and other public officers not in the exceptional category of officers having complete immunity, would have a qualified privilege, giving them a defense against civil liability, for harms caused by acts done by them in good faith in performance of their official duty as they understood it.* • • •'" (Emphasis added.)

In *Joyce* v. *Ferrazzi*, 323 F.2d 931 (1963), the Court, in affirming a dismissal of a complaint for damages under the statute against police officers, stated:

" . . . the plaintiff has failed to make out a case of deprivation of any federally secured right, privilege or immunity. For all that appears the police responded to a call for help from the plaintiff's wife and when she admitted them to the plaintiff's house, observing the plaintiff's conduct to be irrational, even violent, took him into custody using no more force than circumstances warranted. It does not appear that the police made any mistake. *But if they did, not every police error of law or fact arises to the dignity of a deprivation of a federally secured right, privilege or immunity.* Agnew v. City of Compton, 239 F.2d 226, 230, 231 (C.A. 9, 1957), cert. denied, 353 U.S. 959, 77 S.Ct. 868, 1 L.ed. 2d 910 (1957)." (Emphasis added.)

From the *Tenth Circuit* see:

In *Marland v. Heyse*, 315 F.2d 312 (1963), plaintiff had been arrested by police officers on three different occasions without a warrant, and on each arrest he was held for hours and subjected to extensive questioning. No charges were

ever filed against him. Allegedly at times the questioning was accompanied by verbal abuse and threats and allegedly on two occasions his request to use a telephone to call an attorney or his mother was denied. The Court held:

> " . . . A jury question was presented as to whether the conduct of the police officers on the different occasions was so arbitrary, unreasonable *and without probable cause* as to subject the plaintiff to a deprivation of rights guaranteed by the Constitution of the United States."

In *Downie* v. *Powers,* 193 F.2d 760, an action for damages was brought on exactly the opposite ground, i.e., that the police of the city deprived Jehovah's Witnesses holding a religious meeting of protection under the law by not keeping peace and preventing the invasion of constitutional rights by citizens interrupting and trying to break up the meeting. The Court held that whether the police officers should have realized that a breach of the peace was reasonably apprehended and protected the Jehovah's Witnesses was a question for the jury, using the following language:

> "When all the evidence bearing upon the action or inaction of the city officials is considered in its totality we think it presented a factual issue of whether they exercised reasonable diligence in the performance of their statutory duties, or whether they abdicated to the mob. The issue was submitted to the jury under proper instructions and their findings have binding effect here, even though as triers of the fact we might have concluded otherwise." [16]

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[16] See also on liability of police officers for *failure to protect* a negro man and his apparently white wife from violence of others *Bullock* v.

From the *Ninth Circuit* Court of Appeals we call the attention of the Court to:

In *Agnew* v. *City of Compton*, 239 F.2d 226, cert. den. 1 L.ed.2d 910, 353 U.S. 959, plaintiff was arrested by a police officer without a warrant for violation of a city ordinance forbiding the engaging in business of auctioneering without a permit. As a matter of fact the plaintiff was arrested while auctioning his own goods in his own store "as an isolated transaction". The charges were dropped against him. The Court, in denying the right to damages under the Civil Rights Act, held:

> " . . . it would appear that, at most, appellant's arrest was wrongful because the arresting officers misunderstood the ordinance. This would not amount to a deprivation of basic civil rights. *No one has a constitutional right to be free from a law officer's honest misunderstanding of the law or facts in making an arrest.*" [17] (Emphasis added.)

In *Beauregard* v. *Wingard*, 362 F.2d 901, the plaintiff was arrested on bookmaking charges. The plaintiff alleged that he was so arrested because of certain political attacks made by plaintiff on the arresting officer and that his civil rights were violated. The jury brought in a verdict of probable cause for the arrest. The Court, in holding that the plaintiff could not recover under *42 U.S.C. 1983* even

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Tamiami Trail Tours, Inc., C.A. 5, 266 F.2d 326. Here the police were using their best judgment and best effort to protect Petitioners from anticipated violence being wilfully provoked by them.

[17] This holding was not repudiated in the later case of *Cohen* v. *Norris*, C.A. 9, 300 F.2d 24. That was a search and seizure case and the Court merely corrected one statement that it had made in the opinion in *Agnew* to the effect that under the Civil Rights Act it was necessary that the act be wilful. This correction was made in view of the *Monroe* v. *Pape* holding. On the other hand, since *Cohen* v. *Norris* the 9th Circuit has again affirmed the primary holding of *Agnew*. *Beauregard* v. *Wingard*, ante.

though his innocence was subsequently established in the criminal case, used the following language:

> "Although the circumstances under which an arrest without probable cause gives rise to a claim under the Civil Rights Act may not yet be clearly established, see, e. g., Note; The Civil Rights Act of 1871: Continuing Vitality, 40 Notre Dame Law., 70, 80-84. (1964), it should in any event be clear that *where probable cause does exist civil rights are not violated by an arrest* even though innocence may subsequently be established."

From the *Seventh Circuit* Court of Appeals we call the attention of the Court to:

Jennings v. *Nester*, 217 F.2d 153. A conviction at the first criminal trial was reversed and at the second trial plaintiff was accorded all constitutional guarantees. The Court dismissed the complaint against local police officers holding that there was no denial of equal protection of the law, stating "Although it alleges improper acts on the part of the defendants, there is nothing to indicate that every citizen of Illinois is not potentially subject to the same treatment." In dismissing the complaint as against the police officers the Court, in holding that there was no cause of action under 42 U.S.C. 1983, also held: "In determining whether or not plaintiff's constitutional rights have been deprived, we must look at everything that transpired. It is obvious from the complaint that as he stands today, *the plaintiff has been accorded due process* as required by the Fourteenth Amendment."

In *Smith* v. *Dougherty*, 286 F.2d 777, cert. den. 7 L.ed. 2d 97, an action was brought under *42 U.S.C. 1983* against a judge and a sheriff and Chicago police officers charging them with depriving plaintiffs of their constitutional and

civil rights in connection with an allegedly unconstitutional extradition to stand trial in Michigan on a charge of robbery. The Court, in dismissing the complaint, used the following language:

> "It appears to us that this case is governed by our holdings in Stift v. Lynch, 7 Cir., 1959, 267 F.2d 237; Cawley v. Warren, 7 Cir., 1954, 216 F.2d 74; and Truitt v. State of Illinois, 7 Cir., 1960, 278 F.2d 819; and cases cited therein.
>
> "... This Court further held, that no action under the civil rights statutes lay against the Sheriff as no purposeful and systematic discrimination against a class of persons (of which plaintiffs were members) had been shown. Nether has any been shown in the case before us.
>
> "In Jennings v. Nester, 7 Cir., 1954, 217 F.2d 153 which involved police officers, we pointed out that the Federal civil rights statutes were not enacted to discipline local law-enforcement officials."

From the *Eighth Circuit:*

In *Mueller* v. *Powell,* 203 F.2d 797, the Court held that if the arrest was made by the officers in such a way that it was lawful under state law if it was made on probable cause then there was no liability under the Civil Rights Act for deprivation of due process of law and if also the procedure prescribed by the state afford the character of due process contemplated by the Federal Constitution. The Missouri law was to the effect that an officer was justified in making an arrest without a warrant, for a supposed murder, although no felony had actually been committed, but is suspected, "*and* there is reasonable or probable grounds to suspect that the person arrested committed the crime". The Court pointed out "since . . . the Missouri procedure,

if followed, is synonymous with due process under federal law, we may use as the test of lawfulness of appellant's arrest the requirements for a lawful arrest under the state law."

The trial court had found that there was probable cause which was binding in the federal court action. The Court therefore held "If the procedure prescribed by the state actually affords the character of due process contemplated by the federal Constitution, and is followed, there is no denial of the right under the federal Constitution . . ."

> "Appellant's guilt or innocence of the crime for which he was arrested and about which he was questioned was and is not the issue in this case. The trial court expressed no opinion on that question. We, of course, express none. The issue was whether there was factual justification or 'probable cause' for the appellees to suspect that appellant had committed the crime. The trial court found there was. . . ."

In *Pritchard* v. *Downey*, 326 F.2d 323, there was an arrest of civil rights demonstrators. The Court affirmed the district judge in denying any civil liability under *42 U.S.C. 1983*, stating: "Judge Young in his opinion has very satisfactorily demonstrated that substantial evidence supports his finding that probable cause existed for the arrest of each of the plaintiffs . . . An arrest is justified if probable cause exists therefor. *The burden of proving probable cause for arrest is considerably lighter than that involved in sustaining a conviction.*" The Court then pointed out that there was no denial of equal protection or due process stating: "The record shows that a large number of persons other than plaintiffs were arrested on this day. All were processed as rapidly as possible."

From the *Sixth Circuit:*

In *Hurlburt* v. *Graham,* 323 F.2d 723, a complaint for damages againt police officers was dismissed and the dismissal affirmed, the Court stating:

> "The police officers did not become liable under the Civil Rights Act merely because they investigated the accident, served a ticket on the plaintiff which required him to appear before the justice and testified in the case. The officers were not responsible for what subsequently took place in the trial of the case. Cuiksa v. City of Mansfield, supra. Nor do we think that giving a false version of the accident (which plaintiff claims the officers and other defendants did) would bring the case under the Civil Rights Act. If the rule were otherwise, any disgruntled litigant who lost his case in the state court could get a retrial in the federal court by alleging that his opponent gave a false account of the controversy."

In *Gabbard* v. *Rose,* 359 F.2d 182 (1966), the Court followed *Agnew* v. *City of Compton,* 239 F.2d 226, supra, in its holding that "No one has a constitutional right to be free from a law officer's honest misunderstanding of law or facts in making arrest."

From the *District Court in Illinois:*

In *Bowens* v. *Knazze,* 237 F.Supp. 826 (1965), the Court followed the holding of *Monroe* v. *Pape* that liability under 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Under this rule the Court held that such defenses as self-defense or "unforeseeability" of deprivation of civil rights protected the officer acting in good faith. The Court also held that an officer must be

judged by the decisions of the courts at the time of the incident complained of:

> "In order for the Civil Rights Act to apply, the acts complained of must result in a deprivation of rights secured by the Constitution. *Under the general principles of tort liability, it is sufficient that a reasonable man would have foreseen this result.* However, a subsequent determination that the officer's conduct resulted in a deprivation of constitutional rights does not mean that the result was foreseeable and that the officer's conduct was therefore tortious.
>
> "The Civil Rights Act created a new type of tort: the invasion, under color of law, of a citizen's constitutional rights. The test of tortious conduct in an ordinary tort case is, as a general rule, whether at the time of the incident the defendant was negligent, whether he failed to act as a reasonably prudent man. . . .
>
> "In ordinary tort litigation, we allow a jury to find that a defendant committed a tort when, looking back to the event, it finds that the defendant acted unreasonably. . . .
>
> "The tort created by the Civil Rights Act . . . is determined by the courts. If that standard has not yet been enunciated by a court in a manner which makes its applicability to the incident at hand clear, the potential defendant cannot be expected to conform his conduct to it. *Unlike the requirements of a statute or the judgment of the community* which can be applied retroactively, *the retroactive application of the judgment of a court as to the requirements of the Constitution*—based not on community standards but on legal reasoning—*would place a defendant in an impossible position.*
>
> "*It would require law enforcement officers to respond*

in damages every time they miscalculated in regard to what a court of last resort would determine constituted an invasion of constitutional rights, even where, as here, a trial judge—more learned in the law than a police officer—held that no such violation occurred.

• • •

"The applicability of the Civil Rights Act to the facts of this case must be determined with reference to the standards of constitutional protection current at the moment the defendant acted. . . .

"*So long as the defendant's conduct stemmed from his reasonable belief as to the requirements of the law and was not unreasonable in any other* way, he cannot be held responsible—under the standard of liability set forth in Monroe v. Pape—for the deprivation of plaintiff's rights. 'No one has a constitutional right to be free from a law officer's honest misunderstanding of the law or facts in making an arrest'. Agnew v. City of Compton, 239 F.2d 226, 231 (9 Cir. 1956), cert. den. 353 U.S. 959, 77 S.Ct. 868, 1 L.Ed.2d 910 (1957). Thus, *the action of a police officer cannot be tortious when the officer proceeds on the basis of his reasonable, good faith understanding of the law and does not act with unreasonable violence or subject the citizen to unusual indignity. . . .*"

We now turn to the unconvincing and illogical method by which the Fifth Circuit Court of Appeals arrived at its flat conclusion that "the defense of immunity is not available to the police officer appellees in this case". (R. 450)

In our opinion the Court erred in this respect by confusing absolute immunity with partial or limited immunity and was merely holding, or, if it had been called to its

attention, would have merely held that there was no absolute immunity if the acts were not done in good faith with probable cause but were malicious or wilful acts.

We say this because the Court first attempted to base its decision on its own decision in *Norton* v. *McShane,* C.A. 5, 332 F.2d 855, cert. den. 14 L.ed.2d 274. In that case an action under *42 U.S.C. 1983* and under the common law had been brought against certain federal officers charging them with unlawful arrest without probable cause, abuse while being detained, horrible and nauseating mistreatment and malicious assault and battery, together with a conspiracy to deprive plaintiffs of equal protection of the law. "The plaintiffs apparently are seeking relief under both common law and the Civil Rights Acts. . . ." As to the common law cause of action, the Fifth Circuit sustained the district court in dismissing the complaint coming to the conclusion that "by the great weight of authority, law enforcement officers are immune from civil suits (even) based on alleged malicious acts." In taking up the cause of action under the Civil Rights Act the court only actually held that it was not applicable, as it clearly is not, to federal officers. It did not pass on any limited or partial immunity of state officials under Section 1983. Any remark made in the opinion thereasto is pure dicta.

The Fifth Circuit in the present case, after discussing this common law rule of absolute immunity of police officers, which Respondents are not even attempting to rely on here, then said: (R. 449)

> "The rule *may* be otherwise where a claim is asserted under a Civil Rights Act. In Norton v. McShane, supra, it was said: 'While it is clear that the common-law immunity afforded legislative and judicial officers applies in suits under the Civil Rights

> Acts, there remains much *uncertainty*[18] as to the *extent* to which immunity for subordinate executive officials applies, if it applies at all'. . . ."

In this case now before the Court, the court below did not quote the additional language in McShane:

> "In view of our conclusion later in this opinion that the instant suits are not within the purview of the Civil Rights Acts (because against federal officers) we do not decide at this time *the scope* of official immunity under those statutes. We need only say that the doctrine *may* be given more limited application in those suits than it has been given at common law." (dicta)

Thus, McShane did not hold that there was no immunity whatsoever for police officers under the Civil Rights Act and cannot be interpreted as so holding, but merely as expressing some doubt as to the extent thereof. As heretofore pointed out, Respondents here are not seeking to be allowed to establish proof that would justify absolute immunity but merely limited and partial immunity if probable cause is proved.

The court below in its opinion then proceeded to state (R.449): "The uncertainty (as to the scope of the immunity under the Civil Rights Act) then existing (referring to the time of the decision in McShane) still prevails. 15 Am.Jur.2d 452, et seq., Civil Rights, Section 67."

This text is pitifully inadequate and reflects no such uncertainty. It only cites two cases dealing with the liability under the Civil Rights Act of law enforcement officers. both of which held them not liable. The text also recognized

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[18] No authority was cited in McShane for this statement.

there could be a distinction between absolute immunity and limited immunity, citing *Nelson* v. *Knox*, C.A. 6, 256 F.2d 312, to the effect that the mayor, city manager and commissioners did not enjoy "complete immunity". It did not point out that the Nelson v. Knox case did hold that these officers had "a qualified privilege, giving them a defense against civil liability for harm caused by acts done by them in good faith in performance of their official duty as they understood it."

Turning to the only other cases upon which the Fifth Circuit based its decision in this case:

The court stated: (R. 449)

> "By dictum in *Hoffman* v. *Halden*, 9th Cir. 1959, 268 F.2d 280, it was *indicated* that by the Civil Rights Act liability was imposed on state officers for acts within as well as without the scope of their authority if done under color of law."

With this we can cheerfully accede. In fact it is usually required that the act be within the scope of the authority in order to create liability. It was for Monroe v. Pape to extend it to acts beyond the authority. The case did not even indicate, much less hold, that acts performed in good faith by an arresting officer on probable cause would justify damages. The Hoffman Case merely held that a complaint should not be dismissed where it alleged "The County Health Officer and his deputy wilfully failed to act in good faith in forceably taking plaintiff to a place of detention . . . and that they wilfully refused to advise court that they had ignored order and were detaining plaintiff against his wishes and that they made a false return of citation . . . etc." Naturally the complaint stated a cause of action.

The court below in its opinion (R. 449-50) then cites

Monroe v. *Pape,* supra, to the effect that the act of the officers did not have to be performed wilfully in order to create liability. This again we can cheerfully admit. However, there is a vast difference between any holding that an act not performed wilfully but performed in good faith under a statute valid on its face on probable cause was indefensible.

The inexplicable remark of the court below in the opinion is (R. 450): "Inherent in the Monroe holding is the principle that good faith and reliance upon a state statute subsequently declared invalid are not available as defenses."

We submit that no such holding is inherent in Monroe. How could it be inherent in Monroe when, in Monroe, there was no good faith and there was no reliance upon a state statute but the acts were performed in defiance of state statutes. Nor was there in Monroe any case of immunity or partial immunity involved. This is to some extent admitted by the Fifth Circuit which stated that Monroe "did not expressly rule upon the question of immunity." However, as pointed out, supra, there is no immunity involved in search and seizure cases where the search and seizure is without a warrant and where it is not incident to any arrest. The rejection of such a defense in the search and seizure case does not ". . . imply(s) rejection of such a defense as a general proposition." In fact the distinction in the search and seizure cases clearly recognizes that it is not like normal arrest cases and the defenses are different.

This, as heretofore pointed out, is borne out by the next case cited by the court below in its opinion (R. 450), *Cohen* v. *Norris,* C.A. 9, 300 F.2d 24, supra. In that case, another search and seizure case, after the court had held that probable cause for search and seizure was not a defense by one acting without a warrant except under very exceptional circumstances and that probable cause for an arrest was not a defense unless the search and seizure was made incident to

the arrest. The language used by the court below in stating that Monroe v. Pape necessarily implies rejection of such a defense as a general proposition is taken bodily from Cohen v. Norris where it is talking about only a search and seizure case. The court in holding that in Tenney there was no immunity in this type of case very carefully limited to search and seizure cases, stating: "If the language (in Tenney) in so ruling may be considered to be broad enough to include the acts of police officers *in making searches and seizures*, it must be regarded as not controlling in view of Monroe v. Pape." If this were a search and seizure case, this position would not be taken.

We again call the attention of the Court to the holding in *Chapman* v. *United States*, 5 L.ed.2d 828, 365 U.S. 610, and *Johnson* v. *United States*, 333 U.S. 10, 92 L.ed. 436, to the effect that in the absence of very special circumstances a search *not incident to a lawful arrest* must rest on a search warrant, probable cause to obtain such a warrant being insufficient.

The only other case cited by the court below (R. 450) on this issue is again its own decision and again a search and seizure case, *Davis* v. *Turner*, C.A. 5, 197 F.2d 847. Also, again the court merely held that the complaint stated a cause of action where it alleged that the sheriff entered and searched plaintiff's store without warrant of any kind, found nothing unlawful, but seized and arrested her, struck her and put her in jail and refused to tell her the crime for which she was charged. Naturally, it stated a cause of action. The opinion did not preclude any defenses that could be proved.

The court below therefore cited no authority that substantiated its holding. Petitioners cited none.

We therefore submit that Respondents have a right to have submitted to the jury on a new trial the defense of good faith and probable cause not only to the count on

common law false arrest, but also to the count based on *42 U.S.C. 1983*, i.e., establish a partial or limited immunity if they can establish such facts to the satisfaction of the jury.

POINT V

The Court Below Was in Error in Holding That the District Court Made Reversible Error in the Admission of Evidence.

The trial of this case in the district court before a jury resulted in a jury verdict for the Defendants. The cause was reversed by the Fifth Circuit on the ground that the district court made errors in admitting evidence. We submit that the evidence admitted did not constitute reversible error on the part of the District Judge and that this cause should be remanded to the district court and the original judgment therein reinstated.

There was no error in allowing one witness to be asked whether he personally agreed or disagreed with nine statements allegedly tenets of the Communist Party as set forth in the Daily Worker of May 26, 1928.

The witness Jones was, on cross-examination, asked questions as to whether he personally agreed or disagreed with certain statements allegedly read to him from the Daily Worker. (R. 105-111) The Court required him to express his agreement or disagreement with the statements read to him. He stated that he did agree with eight of the tenets and had merely not made up his mind as to one. This witness was then further examined with reference thereto by his own attorney. He was given the opportunity to and did testify that he was not a Communist and disagreed with the Communist Party principle of uniting all workers against the master class and that capitalism means racial

oppression and communism means social and racial equality. The court sustained the objection to the introduction into the record of this issue of the Daily Worker. It therefore allowed only the questions of whether the witness agreed or disagreed with the statements read to him. Neither the questions nor his answers thereto prejudiced him in any way, particularly in view of his full opportunity to state that he was not a communist. The pertinency of inquiry as to what extent, if any, demonstrations and riots are instigated by groups infiltrated by Communists has been fully recognized.

In Mississippi wide latitude is permitted in the cross-examination of a witness. In *Jones* v. *State*, Miss., 76 So. 2d 201, the Court stated:

> "... When a witness voluntarily takes the stand and testifies, he is subject to cross-examination and so long as there is no abuse of the privilege of cross-examination and no prejudice results therefrom except such prejudice as might arise from disclosing the truth, the severity of the cross-examination is no ground for a reversal."

Full and complete cross-examination and great latitude therein is approved by the federal courts. *Gardner* v. *United States*, C.A. 10, 283 F.2d 580; *Dickson* v. *United States*, C.A. 10, 182 F.2d 131; *Young Ah Chor* v. *Dulles*, C.A. 9, 270 F.2d 338; *Fisher* v. *United States*, C.A. 9, 231 F.2d 99; *Bass* v. *United States*, C.A. 8, 326 F.2d 884, cert. den. 12 L.ed.2d 176. Bias or prejudice of the witnesses or motives for his acts or reasons for his actions are proper subject of cross-examination. *Asgill* v. *United States*, C.A. 4, 60 F.2d 776; *United States* v. *Standard Oil Company*, C.A. 7, 316 F.2d 884.

Moreover, the trial judge has broad discretion in the matter of admission or exclusion of evidence. *National Lab.*

Rel. Bd. v. Donnelly Garment Co., 91 L.ed. 854, 330 U.S. 219; *Chapman & Dewey Lumber Co.* v. *Hanks*, 106 F.2d 482; *Hannan* v. *United States*, 131 F.2d 441; *Texas General Indemnity Company* v. *Daniel*, C.A. 5, 283 F.2d 898.

There was no error in allowing admission in evidence of the tension caused by the arrival of the Freedom Riders in Jackson approximately a month before the occurrence here.

The same general principles outlined above are applicable to this issue.

The court below was, we submit, in error in stating that "It is not shown that the earlier incidents (the Freedom Riders) were sufficiently close in point of time to have any relation to the situation with which we are dealing." (R. 450) The issue was the mental attitude of or emotional tension of the citizens of Jackson at the time. If what had occurred a month before was stil in the minds of the populace of the city generally and still influenced them, which was testified to by the witnesses, then it could not be remote on this issue.

The court below was also in error in saying that "No connection was shown between the Freedom Riders and the Prayer Pilgrims, and the appellants denied any connection." (R. 450) On the other hand, the record is replete with statements of Petitioners that they were following up the activities of the Freedom Riders and supporting them.

In the Directive written by witness Morris to all of the participants on June 28th he stated: "I am keeping as closely in touch with the situation as I can so that we may be adequately advised what the best course of action is to the extent that our pilgrimage relates to the Freedom Rides . . . our pilgrimage will in all likelihood be viewed as another or the last of the Rides." (R. 188-9)

This witness also himself testified: "I have not denied we would consider front line fighters in Mississippi to be the Freedom Riders, which we were suporting although we were not Freedom Riders." (R. 174)

This witness also testified:

"A. It is exactly as said there. The primary purpose of the trip was to indicate concern for segregation in the church, but it also concerned those seeking freedom of travel, and at that particular time in the history of Mississippi I suspect this might have meant the Freedom Riders or it might be anyone.

"Q. Did you have in mind anyone other than Freedom Riders when you wrote that?

"A. Anyone who wished to travel at that time, but we had particularly in mind the Freedom Riders. We make no bones of while we were not Freedom Riders, we support the Freedom Riders. I mean you don't have to pry to get this. I will say this frankly.

• • •

"Q. To what did you refer in the letter of June the 16th when you said, 'While present difficulties may have been overcome by September, dangers inherent in the early stages of the pilgrimage must be frankly faced'?

"A. As I indicated yesterday, being an interracial group traveling in the South, we know that about half of the population of Mississippi is White and small percentages of these persons would object to an interracial group, and, therefore, there might be cause for tension among some of the White people who would object to the nature of our group.

"Q. In that statement when you use the phrase

"present difficulties may have been overcome,' weren't you there referring to the Freedom Riders?

"A. I was—." (R. 168-9)

Thus, Petitioners themselves freely admitted the pertinency of the previous Freedom Riders on the tension in the heart of small segments of the Mississippi population and their connection with this movement.

Moreover, previous racial incidents and animosities were held to be material and relevant in *Knight* v. *State*, Miss., 161 So.2d 521, where the Mississippi Supreme Court took judicial notice of the history of Mississippi and of the United States back as far as 1776, considering it relevant and material on the issue of probability of violence. The court stated: "History shows that there has always been friction between different ethnic and religious groups in varying degrees. Compare the intense animosity which has existed between Jew and Arab, Greek and Turk, and Irish and English."

Evidence cannot be immaterial or irrelevant if the court can or will take judicial notice of the same facts. This Court in *Garner* v. *Louisiana*, 368 U.S. 157, 7 L.ed.2d 207, held that this type of evidence should be introduced in the lower court rather than have the appellate court under the necessity of taking judicial notice thereof.

Again, we point out that this evidence was admissible because of the issue to which it applied, i.e., the mental and emotional attitude of and the tension of the group in the terminal at the time of this occurrence. This evidence of occurrences a relatively short time prior thereto resulting in high tension among the people of the City of Jackson, and such tension still continuing to the date of the occurrences here according to the testimony, was admissible to show the justification of the police officers in their belief that the

presence of Petitioners under the circumstances here could result in violence.

These minor objections to the introduction of two isolated types of evidence does not, we submit, constitute reversible error and require a retrial of this entire case. The case was submitted to the jury under proper instructions and no objection of the Court below or Petitioners here is made thereto. Again, in the language of *Jones* v. *State,* supra: "... so long as ... no prejudice results therefrom (strenuous cross-examination) *except such prejudice as might arise from disclosing the truth,* the severity of the cross-examination is no ground for a reversal."

Conclusion

We have strictly limited our argument herein to the legal questions involved. We apologize for the length of this brief. We felt, however, that the decision here could be an important precedent and that the effects thereof could be far-reaching and that this justifies the full development of the legal points involved because:

(1) Police officers can be freely and easily subjected to suits in federal courts in each instance where an arrest was made during demonstrations, disturbances and riots, the volume of such litigation in the federal courts, particularly since Watts and through the tumultuous summer of 1966, could completely clog the federal district courts and later the appellate courts.

(2) The police officers should be held without defense in suits for arrests brought under 42 U.S.C. 1983 unless even months and years thereafter they can establish in each individual case of arrest that the arrested was actually guilty of the offense under a valid statute, regardless of probable

cause to believe that the accused was so guilty and regardless of reliance on a statute valid on its face, then police officers would be harassed to the extent that police action will be difficult to obtain. Why would a police officer take such a chance? An effective police force when needed would be jeopardized. Police officers are poorly paid. A judgment against them would destroy their present and future financial stability and ability to support their families. The need for adequate police protection and action will increase as the Civil Rights Movement changes to a Black Power Movement.

We respectfully urge the Court to give serious consideration to the preservation of the limited common law immunity of police officers if justified under the facts of a particular case and preserve to such police officers their right to a jury trial on such issue.

Respectfully submitted,

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Certificate of Service

The undersigned of counsel certifies that a true and correct copy of the foregoing Brief was this day mailed by United States mail, postage prepaid, to Carl Rachlin, 38 Park Row, New York, N.Y. and Melvin L. Wulf, 156 Fifth Avenue, New York, N.Y., attorneys of record for Petitioners.

This the — day of November, 1966.

THOMAS H. WATKINS
Of Counsel for Respondents.

APPENDIX A

7. Any person violating any section of this act shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not more than Five Hundred Dollars ($500.00), or imprisoned in the county jail for not exceeding thiry (30) days, in the discretion of the court, or the offender may be punished by both such fine and imprisonment.

8. This act shall take effect and be in force from and after its passage (approved June 11, 1964).

SOURCES: Laws, 1964, ch. 238, §§ 1-8.

REFERENCES: 12 Am Jur 2d 664, 684, Breach of Peace and Disorderly Conduct §§ 2 et seq., 28 et seq.

§ 2087.5 Disorderly conduct—may constitute felony, when.

1. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

(1) crowds or congregates with others in or upon shore protecting structure or structures, or a public street or public highway, or upon a public sidewalk, or any other public place, or in any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, motion picture theatre, drive-in, beauty parlor, swimming pool area, or any sports or recreational area or place, or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or county, in which such act or acts are committed, or by any law enforcement officer of the State of Mississippi, or any other authorized person, or

(2) insults or makes rude or obscene remarks or gestures, or uses profane language, or physical acts, or indecent proposals to or toward another or others, or disturbs or obstructs or interferes with another or others, or

(3) while in or on any public bus, taxicab, or other vehicle engaged in transporting members of the public for a fare or charge, causes a disturbance or does or says, respectively, any of the matters or things mentioned in subsection (2) supra, to, toward, or in the presence of any other passenger on said vehicle, or any person outside of said vehicle or in the process of boarding or departing from said vehicle, or any employee engaged in and about the operation of such vehicle, or

(4) refusing to leave the premises of another when requested so to do by any owner, lessee, or any employee thereof,

shall be guilty of disorderly conduct, which is made a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than two hundred dollars ($200.00), or imprisonment in the county jail for not more than four (4) months, or by both such fine and imprisonment: and if any person shall be guilty of disorderly conduct as defined herein and such conduct shall lead to a breach of the peace or incite a riot in any of the places herein named, and as a result of said breach of the peace or riot another person or persons shall be maimed, killed or injured, then the person guilty of such disorderly conduct as defined herein shall be guilty of a felony, and upon conviction such person shall be imprisoned in the Penitentiary not longer than ten (10) years.

2. The provisions of this act are supplementary to the provisions of any other statute of this state.

3. If any paragraph, sentence, or clause of this act shall be held to be unconstitutional or invalid, the same shall not affect any other part, portion or provision of this act, but such other part shall remain in full force and effect.

SOURCES: Laws, 1960, ch. 250, §§ 1-3.
CROSS REFERENCES: §§ 2046.5, 2087.7, 2087.9, this title.
REFERENCE: See generally, 17 Am Jur 187, Disorderly Conduct.

Annotations

Words as disorderly conduct. 48 ALR 87.

Failure or refusal to obey police officer's order to move on, on street, as disorderly conduct. 65 ALR 1152.

JUDICIAL DECISIONS

The constitutionality of this section was challenged in Bailey v Patterson, 199 F Supp 595, in which it was held, in view of the involvement of factual issues, that the Federal court would withhold action until the State courts should pass upon the issues; but this decision was vacated in 369 US 31, 7 L ed 2d 512, 82 S Ct 549, which, affirming that no state may require racial segregation of interstate or intrastate transportation facilities, held that the claim that the statutes so requiring are not unconstitutional was frivolous, and therefore not one in which a three-judge Federal district court is required. The appellants, however, were held to lack standing to enjoin criminal prosecutions under the breach of peace statutes, not having been prosecuted, or threatened with prosecution, under them.

This section is violative of the Fourteenth Amendment to the Federal Constitution. Bailey v Patterson, 206 F Supp 67.

This provision is not so vague and uncertain as to be void. Thomas v State, — M —, 160 So 2d 657.

Whether a specific act is a breach of the peace can only be determined in the light of circumstances. Thomas v State, — M —, 160 So 2d 657.

Any error in refusal to permit identification of an accused by race is rendered immaterial by his presence in court. Knight v State, — M —, 161 So 2d 521.

A "freedom rider" failing to obey a police officer's order, given because of antagonism displayed toward him by other persons present, to leave a bus terminal's waiting room for whites justifies his arrest under this section,

notwithstanding that his presence was in the exercise of a constitutional right. Thomas v State, — M —, 160 So 2d 607; Knight v State, — M —, 161 So 2d 521.

Persons arrested for violating ordinances by parading without a permit, in an antisegregation demonstration, held not entitled to habeas corpus in Federal court on ground that mass arrests had so invaded state courts as to deprive them of an adequate remedy under state law. Brown v Rayfield, 320 F2d 96, cert den 375 US 902, 11 L ed 2d 143, 84 S Ct 191.

§ 2087.7. Disorderly conduct—interference with business, customers, invitees, etc.

1. It shall be unlawful for any person or persons, while in or on the premises of another, whether that of an individual person, or a corporation, or a partnership, or an association, and on which property any store, restaurant, sandwich shop, hotel, motel, lunch counter, bowling alley, moving picture theatre or drive-in theatre, barber shop or beauty parlor, or any other lawful business is operated which engages in selling articles of merchandise or services or accommodation to members of the public, or engages generally in business transactions with members of the public, to:

(1) prevent or seek to prevent, or interfere with, the owner or operator of such place of business, or his agents or employees, serving or selling food and drink, or either, or rendering service or accommodation, or

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APPENDIX B

Section 2087.5 Is Not and Has Never Been Held Unconstitutional on Its Face. Nor Can It Be Retroactively Held That the Enforcement Thereof Valid at the Time Deprived Petitioners of Constitutional Rights.

While there is no doubt that 2087.5 can be enforced so as to deprive defendants of their constitutional rights, as any statute can be, the statute itself is not unconstitutional per se and no court has so held, i.e., it is valid on its face and can be enforced if the arrest thereunder is justified by the facts.

Attached hereto as Appendix A is a complete copy of Section 2087.5 of the *Mississippi 1942 Code*. In the Complaint here, R. 1, there is no allegation that the statute is unconstitutional and relief was not sought on that ground. That was an afterthought—and yet now Petitioners' chief reliance, repeated throughout their brief, is "The fact that the statute under which the arrests were purportedly made was unconstitutional on its face is sufficient to require a directed verdict against the policemen even though the formal holding of unconstitutionality was not made by this court until after the arrests." (Their brief, p. 18)

The most cursory reading of Section 2087.5 reflects that it specifically describes what constitutes a misdemeanor thereunder. It does not make it a misdemeanor merely to fail to obey an order of an officer to disperse and move on. There must be present also (1) a gathering "with *intent* to provoke a breach of the peace" and (2) a gathering "under circumstances that such a breach of the peace *may be* occasioned thereby." Thus, the statute clearly does not require any actual disturbance of the peace by the person arrested or any intent to disturb the peace, but merely either an intent to provoke other parties to breach the peace or that acts might occasion someone else to breach the peace.

The offense of "breach of the peace" is a well defined common law offense. "Breach of the peace is a common law offense . . . The offense may consist of acts of public

turbulence or indecorum in violation of the common peace and quiet . . . or of acts such as tend to excite violent resentment or to provoke or excite others to break the peace . . . Accordingly, where means which cause disquiet and disorder, and which threaten danger and disaster of the community, are used, it amounts to a breach of the peace although no actual personal violence is employed . . ." 11 C.J.S., Breach of the Peace, p. 818.

The Mississippi Statute is not so vague and uncertain as to be unconstitutionally void and unenforceable. " 'The Constitution does not require impossible standards'; all that is required is that the language 'convey sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices.' United States v. Petrillo, 332 U.S. 1 * * * that there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . ." *Roth* v. *United States,* 354 U.S. 476, 1 L.ed.2d 1498, and cases cited. Cf. *Jordan* v. *DeGeorge,* 341 U.S. 225, 95 L.ed. 886; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 86 L.ed. 1031; *United States* v. *Ragen,* 314 U.S. 513, 86 L.ed. 383; *United States* v. *Harriss,* 347 U.S. 612, 98 L.ed. 989; *Winters* v. *New York,* 333 U.S. 507, 92 L.ed. 840.

Breach of the peace statutes like the Mississippi statute have consistently been upheld as constitutional, and convictions upheld where the particular facts justified the enforcement thereof.

In 1961 when the acts here complained of occurred the applicable expressions of this Court included:

In *Feiner* v. *New York,* 95 L.ed. 295, 340 U.S. 315, a student was addressing a crowd, including Negroes, through a loud-speaker system from a box on the sidewalk and making derogatory remarks concerning public officials and indicating that Negroes should rise up in arms and fight for equal rights. The speaker himself was not disorderly. However, the police noted the excitement which was aroused by his speech and reached the conclusion that it might result in a fight. One of the officers requested the speaker to

get off the box. He did not accede to the request and continued talking. The officer then arrested the speaker without a warrant and he was charged with a misdemeanor under the New York breach of the peace statute which was practically identical with the Mississippi statute. This was an appeal from a criminal conviction and under the facts, admittedly stronger there than here, the Court upheld the conviction. This Court in *Feiner* clearly upheld the constitutionality of such a statute and affirmed a conviction where under the particular facts and circumstances a breach of the peace might produce violence in others. In that case the Court held:

> ". . . the trial judge reached the conclusion that the police officers were justified in taking action to prevent a breach of the peace. * * * They found that the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare. * * * 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. *It includes not only violent acts but acts and words likely to produce violence in others.* . . .'"

In *Cantwell* v. *Connecticut,* 84 L.ed. 1213, 310 U.S. 296, the Court reversed a criminal conviction under the particular facts there present but carefully pointed out: "One may, however, be guilty of the offense *if he commit acts or make statements likely to provoke violence* and disturbance of good order, even though no such eventuality be intended." The Court also carefully limited the constitutional rights of the individual to the superior rights of the state to prevent disorder, stating: "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears the power of the state to prevent or punish is obvious."

No statute similar to the Mississippi statute has been held unconstitutional on its face or per se by this Court.

Opposing counsel cite only cases where the courts have held that under particular facts there involved the statutes

were unconstitutionally enforced, i.e., that there was no proof of facts which constituted a breach of the peace and thus criminal convictions were merely reversed. That is all that was held in *Brown* v. *Louisiana,* 15 L.ed.2d 637, 383 U.S. 131.

True, in *Edwards* v. *South Carolina,* 372 U.S. 229, 9 L.ed.2d 697, [1] involving proof of nothing more than a peaceful expression of unpopular views, the court held the statute vague and indefinite. It did so, however, because it had been interpreted by the Supreme Court of South Carolina in such a way as to be vague and indefinite. The Supreme Court of South Carolina had held that the offense was "not susceptible of exact definition" and that it included any expression of views which "stirred people to anger, *invited public dispute, or brought about a condition of unrest.*" Admittedly the common law offense of breach of the peace is not that broad and a "condition of unrest" is vague and indefinite.

Similarly, in *Cox* v. *Louisiana,* 379 U.S. 536, 13 L.ed.2d 471, [2] the Court again held that a breach of the peace statute was vague and indefinite and could not stand, but again solely because the Supreme Court of Louisiana had broadly defined a breach of the peace as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, *to disquiet.*" Here, again, the definition was much broader than the common law offense of breach of the peace and the language included in the definition thereof is vague and indefinite.

The Supreme Court of Mississippi, on the other hand, has held the statute constitutional and in so doing, in affirming a criminal conviction, has based it upon there having been proof that *actual violence* could have been provoked. In *Thomas* v. *State,* 160 So.2d 657, the Supreme Court of Mississippi thought there was sufficient evidence to justify a finding that "if the officer had not acted in ordering defendant to move on there would have been *violence.*" They merely held that the Mississippi statute could be enforced in a situation where city officials in good faith

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[1] Involving merely reversal of criminal convictions.
[2] Involving merely reversal of criminal convictions.

believe that disorder and violence were imminent, i.e., narrowly construed the statute.

True, the convictions in *Thomas* v. *State* were reversed, but they were not reversed on the ground that the Mississippi statute was unconstitutional on its face or that there could be no arrest under it where city officials in good faith believed or the record showed that violence was imminent. The reversing opinion is reported *Thomas* v. *State,* 14 L.ed.2d 151. In its per curiam opinion this Court merely cited by name *Boynton* v. *Virginia,* 364 U.S. 454, 5 L.ed.2d 206. The Boynton Case did not even involve a breach of the peace statute, but a "trespass" statute. The Court in Boynton did no more than hold that the *Interstate Commerce Act* prohibited the officers enforcing the trespass statute at the request of the terminal restaurant manager, i.e., that the defendants had a right given them by a *federal statute* to remain in the white portion of the station and therefore could not be guilty of trespass. The Court in Boynton specifically pretermitted any constitutional question.

Officers of the City of Jackson are under an injunction not to enforce unconstitutional state statutes requiring segregation of public facilities, including those of carriers. *Bailey* v. *Patterson,* 323 F.2d 201, certiorari denied 11 L.ed.2d 609. They are not under an injunction from enforcing the breach of the peace statute if a breach of the peace actually occurred or was imminent in a facility of a terminal.

This Court has never held that there can be no arrest for a breach of the peace in the terminal of a carrier *regardless of the facts or circumstances and regardless of imminent violence.* The situation then resolves itself to one of fact as to whether or not under the Mississippi statute there could be arrest *if violence from others was imminent* or if the arrest was made by the officers in good faith believing that violence was imminent and not for the purpose of preventing integration. This is a jury issue.

Nor can it be said as a matter of law that violence from others towards Episcopal ministers could not possibly be imminent. In the August 26, 1966, edition of "Time" under

the heading of "Religion" there appeared the following article:

> "Like many other priests, nuns and ministers, Sister Mary Angelica, 41, a second-grade teacher at Sacred Heart School in Melrose Park, last month joined Martin Luther King's march for integrated housing through the streets of Chicago. 'In the heavily Catholic Gage Park neighborhood, an angry youth in a jeering mob yelled, 'This is for you, nun!' and threw a brick at her. The missile struck Sister Angelica on the back of her head, opened a cut that soaked her black veil and white collar with blood. Unashamed, the crowd cheered."

The distinction between laws which are void and a nullity on the one hand and on the other hand laws which are fair on their face but nevertheless can be or are being administered in such a way as to result in deprivation of civil rights is well recognized. For example, statutes requiring segregation in schools are void on their face. *Bush* v. *Orleans Parish School Board,* 187 F.Supp. 42, motion denied 5 L.ed.2d 806, 365 U.S. 569. However, pupil placement statutes are usually valid on their face but can be unconstitutionally applied under given circumstances. *Flax* v. *Potts,* 204 F.Supp. 458, affirmed 313 F.2d 284. Cf. *Rice* v. *Elmore,* C.A. 4, 165 F.2d 387, cert. den. 92 L.ed. 1151, 333 U.S. 875.

And note the difference between *Murdock* v. *Pennsylvania,* 87 L.ed. 1292, 319 U.S. 105, and *Douglas* v. *Jeannette,* 87 L.ed. 1324, 319 U.S. 157. Both cases involved a city ordinance of the City of Jeannette which prohibited the solicitation of orders for merchandise without first procuring a license from the city authorities. In Murdock the Court reversed some criminal convictions where the ordinance was applied to the dissemination by Jehovah's Witnesses or religious tracts, holding the ordinance as so applied an unconstitiutional invasion of constitutional rights. However, in *Douglas* this Court under the same circumstances refused to grant a general injunction against the enforcement of the ordinance stating that a federal court should not" . . . attempt to envisage in advance all the diverse

issues which could engage the intention of state courts and prosecution of Jehovah's Witnesses for violations of the present ordinance . . . by a decree saying in what circumstances and conditions the application of the city ordinance will be deemed to abridge freedom of speech and religion."

While criminal convictions can be reversed retroactively, liability for money damages cannot be imposed retroactively.

When the acts here complained of took place the applicable law, as expressed by this Court, was found in *Cantwell* v. *Connecticut* and *Feiner* v. *New York,* supra. A finding by this Court now that officers could not make an arrest if those arrested were not themselves violent if the officers had reasonable grounds to believe that violence in others was imminent could not, we believe, be retroactively applied so as to *impose liability for money damages* on police officers who were acting in good faith at the time. Police officers are not attorneys and do not have attorneys by their side advising them. The question in this case is not whether or not under the facts here they acted erroneously. Good faith errors of law or fact do not impose liability on police officers.

Where a criminal statute is later held totally unenforceable because unconstitutional on its face or in conflict with a later federal statute, this Court has held with great reluctance that a criminal conviction prior to the passage of the federal statute will be retroactively reversed. In *Hamm* v. *Rock Hill,* 13 L.ed.2d 300, and *Bell* v. *Maryland,* 12 L.ed.2d 822, the Court held in suits which were pending when the law was changed that the conviction must be reversed but on the theory that "* * * there can be no legal conviction nor any valid judgment pronounced upon conviction unless the law creating the offense be at the time in existence."

That, however, is the exact opposite of the situation here. Can a change in decisions or rules or interpretation of statutes make a person civilly liable for acts which were legal when performed and by which he incurred no liability when performed? This is a case of attempt to create lia-

bility by construction of statutes by courts after the act was performed.

"The overruling of previous decision by a court . . . may work perspectively but will not be permitted to retroact * * * as where contracts are made or rights acquired in reliance on the construction of a constitutional provision or a statute by an earlier decision, which construction is afterwards changed by an overruling decision." *21 C.J.S.*, Courts, 329. Cf. *Jackson* v. *Harris,* C.A. 10, 43 F.2d 513; *Douglass* v. *Pike County,* 25 L.ed. 968; *Reppel* v. *Board of Liquidation,* 11 F.Supp. 799; *Safarik* v. *Udall,* 304 F.2d 944, cert. den. 9 L.ed.2d 164; *Swan Island Club* v. *White,* 114 F.Supp. 95, affirmed 209 F.2d 698.

Unquestionably the police officers here saw that Petitioners themselves were not being violent. Unquestionably they acted in reliance on the interpretation of such a statute as in Cantwell v. Connecticut, supra, that there was a violation of the persons arrested were committing acts "likely to provoke violence" or when there was a clear and present danger of a disturbance of the public safety and order. Should this Court now interpret the statute as not authorizing an arrest for provoking violence by another, then the statute would be retroactively construed to the injury and damage of these policemen and thereby deprive them of the right of making a decision as to whether or not to arrest. Certainly the officers had a choice whether to arrest or not. They acted under the assumption, as they had a right to do, that the breach of the peace statute was legal and valid and that there could be arrests without any violence on the part of the person arrested if their nonviolent acts probably would lead to a breach of the peace by someone else. The Court below pointed out that these policemen were "acting in Mississippi . . . in good faith under a state statute which they were entitled to presume to be valid". (R. 449)

We thus have a situation where if justified by the facts the statute could be enforced. Whether or not the statute was properly enforced in a particular case is a question of fact. If the police officers acted erroneously and without what this Court would call sufficient cause or probable

cause, this would justify this Court in reversing criminal convictions but would not, we submit, justify the imposing of money damages on the police officer who, acting in good faith, made an error in exercising his best judgment and discretion.

Police officers are immune from common law tort liability if *acting in good faith* under a state statute which they were entitled to presume to be valid and acting under facts and circumstances under which in good faith they believed the statute could be enforced. See Point I hereof. The rule is the same under *42 U.S.C. 1983*. See Point IV hereof.

Moreover, there is a well established common-law rule that a public officer acting in reliance on a statute afterwards declared to be even invalid on its face does not incur any civil liability to one injured by his previous acts if he is thereby deprived of rights and it works a hardship on him personally.

This is, as pointed out by the court below, the Mississippi rule. See *Golden* v. *Thompson,* 11 So.2d 906, where the court held: (syl.)

> "Officials of consolidated school who acted in good faith reliance on statute permitting consolidated schools to collect tuition fee from high school students did not incur personal liability by excluding from school students who failed to pay fee required by order of school board, regardless of whether such statute, the constitutionality of which had not been judicially determined, was actually invalid."

True, the Mississippi court said that in so holding it was adopting the minority rule. We think the court was confused in so stating and meant it was following an exception to the general rule. Its basis therefore was a citation of *16 C.J.S.* Constitutional Law, Sec. 101, subdivision c, p. 479.[3] A most casual reading of this section of C.J.S. shows that it is dealing only with cases where the statute was held void on its face and a complete nullity. A well es-

[3] The opinion erroneously said p. 290.

tablished exception is noted. On page 480 no conflicting rule is stated to the text statement that:

> "Also, the rule that an unconstitutional law is a nullity cannot be applied to work hardship and impose liability on a public officer who, in performance of his duty, has acted in good faith in reliance on the validity of a statute before any court has declared it invalid. . . ."

The Mississippi case of *Golden* v. *Thompson* is cited thereto. Many other authorities are cited thereto.

For example, by cases cited to the above quotation from the text, it is held that tax collectors are not personally liable for tax moneys collected by them without protest under a statute subsequently declared unconstitutional, citing *Anniston Mfg. Co.* v. *Davis*, C.A. 5, 87 F.2d 773, affirmed 81 L.ed. 1143, and *Lincoln Mills of Alabama* v. *Davis*, C.A. 5, 89 F.2d 1012.

The Mississippi rule, as so stated in the text, is followed by Idaho, Illinois, Oklahoma, Tennessee, Texas, Utah, California, and New York. See also the application of the rule by the federal courts prior to Erie, i.e., *Cudahy Packing Co.* v. *Harrison*, 18 F.Supp. 250, appeal dismissed 102 F.2d 981, where the court announced the rule as follows:

> ". . . Plaintiff invokes the generality, 'An unconstitutional law is no law.' It is sufficient to say that the general language invoked cannot be applied to work a hardship upon a public officer who, in the performance of his duty, has acted in good faith, in reliance upon the validity of a statute and before any court has found that the statute is invalid."

The federal courts freely recognize qualifications of any rule of absolute retroactive invalidity of statute. In the case of *Chicot County Drainage District* v. *Baxter State Bank*, 84 L.ed. 329, 308 U.S. 371, the defendant pled res adjudicata based on a decree of the federal court under a federal statute in bankruptcy providing for "municipal-debt readjustments". After the decree was entered the

Act of Congress was declared unconstitutional. The Court, in holding in spite of this fact that the prior decree was res adjudicata, used the following language:

> "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. . . . It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified. . . ."

The Chicot case was cited with approval and followed in *J. A. Dougherty's Sons* v. *Commissioner of Internal Rev.*, C.A. 3, 121 F.2d 700, where the court held:

> "Although it was formerly held that an unconstitutional statute is a nullity ab initio . . . more lately it has been recognized that the consequences of action taken or restricted in obedience to the requirements of a statute which subsequently is declared unconstitutional are to be appraised and adjudged in the light of

> the compulsion exerted by the statute prior to its determined invalidity. . . . The subject taxpayer is under compulsion to pay due regard to the requirements of the statute until its invalidity has been authoritatively adjudicated. . . ."

Similarly here the police officers were under compulsion and duty to enforce the statute until its invalidity had been authoritatively adjudicated.

The Third Circuit similarly cited and followed the Chicot case in *Phipps* v. *School Dist. of Pittsburgh,* 111 F.2d 393.

Cf. *Lone Star Motor Import, Inc.* v. *Citroen Cars* Corp., C.A. 5, 288 F.2d 69.

Moreover, as stated, the C.J.S. text and the cases thereunder are dealing with statutes which are later declared to be unconstitutional on their face or per se and a nullity. They do not deal with cases where by later decisions the courts merely changed the rulings as to the enforcement thereof, i.e., where courts later by decision enlarged the rules as to what is an unconstitutional enforcement of the statute. The rule as to such change of or new decisions is stated in *21 C.J.S.* Courts, p. 329, as follows:

> "The foregoing general rule as to an overruling decision having a retroactive effect is subject to the well-settled exception that the construction of the law, as given by the overruling decision, may work prospectively but will not be permitted to retroact so as to impair the obligations of contracts entered into, or injuriously affect vested rights (i.e., immunity or privilege) acquired, in reliance on the earlier decision * * * and this rule has been held to apply to the construction of taxation statutes. . . ."

See the announcement of the rule in *Jackson* v. *Harris,* C. A. 10, 43 F.2d 513, as follows:

> "There is a well settled exception to this general rule that, where contracts have been entered into or rights acquired upon the faith of a decision, they cannot be imparied by a change of construction made by

a subsequent decision. Moore-Mansfield Co. v. Electrical I. Co., 234 U.S. 619, 623, 34 S. Ct. 941, 58 L. Ed. 1503; Douglass v. County of Pike, 101 U.S. 677, 687, 25 L. Ed. 968; Green County v. Conness, 109 U.S. 104, 3 S. Ct. 69, 27 L. Ed. 872; New Buffalo v. Cambria I. Co., 105 U.S. 73, 26 L. Ed. 1024; Nickoll v. Racine C. & S. Co., 194 Wis. 298, 216 N. W. 502, 504; Wilkinson v. Wallace, 192 N. C. 156, 134 S. E. 401, 402; Hoven v. McCarthy Bros. Co., 163 Minn. 339, 204 N. W. 29; 15 C. J. 960, § 358. See also Tidal Oil Co. v. Flanagan, 263 U. S. 444, 451-452, 44 S. Ct. 197, 68 L. Ed. 382."

Cf. *Douglass* v. *Pike County*, 25 L.ed. 968; *Safarik* v. *Udall*, 304 F.2d 944, cert. den. 9 L.ed.2d 164; and cases cited to the notes to the above text.

When this question has been raised the federal courts have consistently held that *42 U.S.C. 1983* would not be construed as imposing liability in the form of money damages upon an officer who in the performance of his duty acted in good faith in reliance on a statute valid on its face.

In *Striker* v. *Pancher*, C.A. 6, 317 F.2d 780, a civil action for damages under Section 1983 was brought against a sheriff who advised a prisoner to plead guilty so as to obtain a lesser sentence and the plaintiff did plead guilty without counsel. At the time of this advice it had never been held that a person accused of larceny in the state court had a constitutional right to counsel. It had been held that this was not a constitutional right in *Betts* v. *Brady*, 86 L.ed. 1595. This ruling was later overruled in *Gideon* v. *Wainwright*, 9 L.ed. 2d 799. However, the advice was given before Gideon. The Court, in holding that civil liability must be viewed in the *light of the law at the time the act was committed*, used the following language:

"It must also be kept in mind that at the time these events occurred (1952) the law as established by the Supreme Court was that a person accused of larceny in a state court had no constitutional right to counsel. Betts v. Brady has since been overruled, and the law as announced in the later case must be viewed as the law in the prior period. But we think this does not

mean that failure to appoint counsel in a larceny case in 1952 was such a deprivation of a constitutional right as to subject the state authorities to personal liability for damages under the statute here involved. . . . We keep in mind that we are not considering the validity of the judgment of conviction by reason of the failure to furnish the defendant the benefit of counsel. Such failure, although in a background of good faith, nevertheless invalidates the judgment. . . . Our question is a different one, namely, whether, in addition to invalidating the judgment of conviction, such failure also automatically constitutes a violation of the civil rights statute, under which this civil action for damages was instituted. We think such a result does not automatically follow and does not follow here."

In *Bowens* v. *Knazze*, D.C. Ill., 237 F.Supp. 826, the court pointed out that any retroactive imposition of liability on police officers would "require law enforcement officers to respond in damages every time they miscalculated in regard to what a court of last resort would determine constituted an invasion of constitutional rights." The Court then stated:

". . . Unlike the requirements of a statute or the judgment of the community which can be applied retroactively, the retroactive application of the judgment of a court as to the requirements of the Constitution—based not on community standards but on legal reasoning—would place a defendant in an impossible position.

"It would require law enforcement officers to respond in damages every time they miscalculated in regard to what a court of last resort would determine constituted an invasion of constitutional rights, even where, as here, a trial judge—more learned in the law than a police officer—held that no such violation occurred.

• • •

"The applicability of the Civil Rights Act to the facts of this case must be determined with refernce to the standards of constitutional protection current at the moment the defendant acted. . . .

"So long as the defendant's conduct stemmed from his reasonable belief as to the requirements of the law and was not unreasonable in any other way, he cannot be held responsible—under the standard of liability set forth in Monroe v. Pape—for the deprivation of plaintiff's rights. . . . *Thus, the action of a police officer cannot be tortious when the officer proceeds on the basis of his reasonable, good faith understanding of the law and does not act with unreasonable violence or subject the citizen to unusual indignity.* . . ."

The court below in holding that under the Mississippi rule as expressed in Golden v. Thompson, supra, that there was no common-law liability for false arrest where the officer acted in good faith in reliance upon a state statute subsequently declared invalid stated that: ". . . the authorities are not uniform as to whether a public officer can be held civilly liable for acting under the authority of a state statute subsequently held invalid. Miller v. Stinnett, 10th Cir. 1958, 257 F.2d 910." (R. 452)

The case of *Miller* v. *Stinnett*, C.A. 10, 257 F.2d 910, did point out a conflict but in so doing, cited only a few authorities holding an officer civilly liable for arrests made under statute subsequently declared invalid where the statutes were held invalid on their face or per se and were a complete nullity. In the Miller Case itself, however, the statute was not held unconstitutional on its fact but merely unconstitutionally applied by the officer and the court pointed out: "There is good and respectable authority for saying that an arrest made by a police officer for acts committed in his presence in violation of an ordinance valid upon its face, is privileged and not actionable for subsequent declaration of invalidity," citing not only the Mississippi authority but cases from Texas, Tennessee, Illinois and Michigan. True, the court in that case reversed the.

lower court, but the lower court had dismissed the complaint as failing to state a cause of action. The reversal was on the ground, and only on the ground, that "While a detention made in good faith reliance on an ordinance valid on its face, but invalid or inapplicable in fact may be privileged . . . We think the stated facts susceptible to the permissible inference that the arrest and detention was not made in good faith reliance on the ordinance, but instead for the purpose of harassment to serve selfish ends, thus defeating privileged detention . . . In short, we think the appellant stated a case for the trier of the facts." On reversal and remand of the Miller Case the complainants had the burden of proving the allegations of the complaint. The court did not preclude the defense of good faith.

The court below refused to recognize good faith as a defense to actions under *42 U.S.C. 1983*. Its only authority therefor was the statement that "Inherent in the Monroe holding is the principle that good faith and reliance upon the state statute subsequently declared invalid are not available as defenses." (R. 450)

There is no basis whatsoever for any such assumption on the part of the court below. The Monroe Case dealt with actions of the police officers not only not based on any state statute or in reliance on any state statute, but in direct conflict with state statutes.

The Mississippi rule as expressed in *Golden* v. *Thompson*, supra, is no a local rule not recognized in other states. There is no federal authority in coflict therewith. We again refer the Court to Striker and Bowens, supra, involving actions under *42 U.S.C. 1938*.

We also refer the Court to the decisions from the Supreme Court of the United States cited in *Jackson* v. *Harris*, 43 F.2d 513, supra, in support of the rule that where contracts have been entered into or rights acquired upon the faith of a decision they cannot be impaired by a change of construction made by a subsequent decision. The rights here acquired were the rights to immunity if the acts were done in good faith upon probable cause.

Petitioners rely primarily on *Smith* v. *Allwright*, 321 U.S. 649, 88 L.ed. 987. In that case an action under 42 U.S.C.

1983 was brought by a Negro against election judges for failure to permit him to cast a ballot in a primary election. "The refusal is alleged to have been solely because of the race and color of the proposed voter." The complaint was dismissed in the court below without trial on the basis of a prior decision of the Supreme Court. The action of the election judges was based on a resoluton of the Executive Committee of the Democratic Party to the effect that white Democrats and none other might participate in the primary. This Court reversed its prior ruling and held that where the primary is by law made an integral part of the election machinery that this resolution of the Executive Committee of the Democratic Party had the effect of a state statute and was void on its face. It therefore merely reversed the lower court in dismissing the complaint. The case can be distinguished on three grounds: (1) *The resolution,* held a statute, *was void on its face* in specifically denying to Negroes their constitutional right to vote. (2) *The question of the retroactive effect of the change of new decision of the Supreme Court was not raised.* (3) The case was remanded for a trial, although it was apparently admitted that the refusal was solely because of the race and color of the proposed voter. If so, there would be no immunity of any kind. There is no common-law immunity under any circumstances for deliberate denial of the right to vote because of color. There was not involved in that case the question of immunity of police officers or judicial officers.[4]

[4] The other three cases relied on by Petitioners, *Lane* v. *Wilson,* 83 L. ed. 1281, 307 U.S. 268; *Nixon* v. *Herndon,* 273 U.S. 536, 71 L. ed. 759; and *Myers* v. *Anderson,* 238 U.S. 368, 59 L. ed. 1349, can all be distinguished on the above grounds.